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No. 307

In the Supreme Court of the United States

OCTOBER TERM, 1960

EZRA TAFT BENSON, SECRETARY OF AGRICULTURE OF THE UNITED STATES, APPELLANT,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

BRIEF FOR THE SECRETARY OF AGRICULTURE

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OPINION BELOW

The opinion of the District Court (I R 157-170)[1] is in 182 F. Supp. 81. The report of the Interstate Commerce Commission (I R 83-151) is in 300 I.C.C. 453.

JURISDICTION

This action was instituted to enjoin, set aside, annul, and suspend an order of the Interstate Commerce Commission dated May 10, 1957, pursuant to the provi-

[1] The printed record consists of seven volumes. Volume I of the record is referred to in this brief as "I R", and the subsequent volumes are referred to herein as "II R" through "VII R."

sions in 49 U.S.C. § 17(9); 28 U.S.C. §§ 1336, 1398, 2284, 2321-2325; and 7 U.S.C. §§ 1291(b), 1622(j). The judgment of the District Court was entered on March 25, 1960 (I R 157, 170), and a notice of appeal was filed in the District Court by the Secretary of Agriculture on May 23, 1960 (I R 174-176). Probable jurisdiction was noted on October 17, 1960 (I R 177; 364 U.S. 860). The jurisdiction of this Court is conferred by 28 U.S.C. §§ 1253 and 2101(b).

STATUTE INVOLVED

The relevant provisions of the Interstate Commerce Act (24 Stat. 379, as amended, 49 U.S.C. §§ 1(3)(b), 1(4), 3(1), 3(4), 5(2), 6(1), 15(1), 15(3), and 15(4)) are set forth in the Appendix, *infra*, pp. 74-81.

QUESTIONS PRESENTED

The Spokane, Portland and Seattle Railway System (S.P. & S. System) maintains joint rates as to all commodities with the Great Northern Railway Company and the Northern Pacific Railway Company (generally referred to as the Northern Lines) but—with limited exceptions—not with the Chicago, Milwaukee, St. Paul and Pacific Railroad Company (Milwaukee Road). The Milwaukee Road competes with the Northern Lines. The Interstate Commerce Commission concluded that, with limited exceptions, through routes do not exist between the S.P. & S. System and the Milwaukee Road, and the Commission rejected the contention, based on §§ 1(4), 3(1), and 3(4) of the Interstate Commerce Act, that the S.P. & S. System is required to establish additional competitive joint rates with the Milwaukee Road. The Commission refused

to compel the S.P. & S. System to establish additional through routes and competitive joint rates with the Milwaukee Road under § 15 of the Act. The basic facts, as distinguished from the ultimate conclusions of the Commission, are generally undisputed. The District Court affirmed the decision of the Commission. In the circumstances, the questions presented are:

1. Whether the Commission properly applied the appropriate criteria in determining that, with limited exceptions, through routes do not exist between the S.P. & S. System and the Milwaukee Road?

2. Whether the Commission properly applied the appropriate criteria in failing to conclude that, under § 1(4) of the Act, the S.P. & S. System is required to establish additional joint rates with the Milwaukee Road which are just and reasonable; and whether the Commission properly applied the appropriate criteria in concluding that the S.P. & S. System is not violating the provisions of § 3(1) of the Act relating to undue preferences or prejudices or § 3(4) of the Act relating to discrimination against a connecting line?

3. Whether the Commission erred in failing to determine and prescribe just and reasonable joint rates under § 15(1) of the Act with respect to shipments made over the Milwaukee Road and the S.P. & S. System, in view of the violations by the S.P. & S. System of §§ 1(4), 3(1), and 3(4) of the Act?

4. Assuming, *arguendo*, that with limited exceptions through routes do not exist between the S.P. & S. System and the Milwaukee Road, whether the Commis-

sion properly applied the appropriate criteria in concluding that it should not require the S.P. & S. System to establish through routes and competitive joint rates with the Milwaukee Road under the provisions of § 15(3) and (4) of the Act?

5. As one of the questions subsidiary to Question 4, *supra*, whether the Commission properly determined the question presented in this case for the first time as to whether the S.P. & S. System can, within the meaning of § 15(4) of the Act, be "operated in conjunction and under a common management or control" with two other railroads, *viz.*, the Northern Lines, each of which owns 50% of the stock of the S.P. & S. System, inasmuch as the two other railroads are admittedly not operated under common management or control and, admittedly, neither of the two other railroads can determine independently the transportation policy of the S.P. & S. System?

6. Whether adequate findings were made by the Commission, and whether substantial evidence on the record as a whole supports the Commission's findings and conclusions with respect to each of the foregoing questions?

STATEMENT

1. The Parties in the District Court

This action was instituted in the United States District Court for the Eastern District of Wisconsin by the Chicago, Milwaukee, St. Paul and Pacific Railroad Company (Milwaukee Road) against the United States, the Interstate Commerce Commission, the Spokane, Portland and Seattle Railway Company, the Great Northern Railway Company, and the Northern Pa-

cific Railway Company (I R 1-42). The Secretary of Agriculture of the United States intervened as a plaintiff in the District Court (I R 43-53, 75-77), together with the National Livestock Producers Association, the American National Cattlemen's Association, the National Wool Growers Association, and the Chicago Producers Commission Association (I R 71, 75-77). Six railroad companies intervened as defendants (I R 54, 67).

Because of the widespread importance of this case to a substantial segment of the agricultural community, see, *infra*, pp. 15-17, the Secretary of Agriculture intervened pursuant to § 201 of the Agricultural Adjustment Act of 1938, as amended (52 Stat. 31, 36, 7 U.S.C. § 1291). The Secretary is authorized by this Act to participate as a party in proceedings before the Interstate Commerce Commission with respect to "rates, charges, tariffs, and practices relating to the transportation of farm products" (52 Stat. 31, 36, 7 U.S.C. § 1291(a)). The Act provides that the "Secretary shall have the rights of a party before the Commission and the rights of a party to invoke and pursue original and appellate judicial proceedings involving the Commission's determination" (52 Stat. 31, 36, 7 U.S.C. § 1291(b)). See, also, § 203(j) of the Agricultural Marketing Act of 1946 (60 Stat. 1087, 1088-1089, 7 U.S.C. § 1622(j)).

2. Statement of the Facts and Issues

a. *Existing Routes and Rates*

The Spokane, Portland and Seattle Railway Company and its wholly owned subsidiaries, *viz.*, the Oregon Electric Railway Company and the Oregon Trunk Railway (generally referred to as the S.P. & S. System), operate 950 miles of rail lines in Washington and Oregon, terminating in the east at Spokane, Washington (I R 93-96; 300 I.C.C. at 461-462). The Milwaukee Road operates approximately 10,600 miles of rail lines, including rail lines from Chicago, St. Paul, and Minneapolis to Spokane and, also, to points west of Spokane (I R 95-96; 300 I.C.C. at 462). The Milwaukee Road does not compete with the S.P. & S. System, but the Milwaukee Road is in competition with the Great Northern Railway Company and the Northern Pacific Railway Company, sometimes referred to herein as the Northern Lines (I R 94-96; 300 I.C.C. at 461-463). Specifically, the Northern Lines compete with the Milwaukee Road for eastbound and westbound traffic passing through Spokane (I R 106-124; 300 I.C.C. at 471-484).

The S.P. & S. System has through routes and joint rates[2] applicable with respect to all commodities in

[2] As we show, *infra*, pp. 35-37, a through route is an arrangement, express or implied, between connecting railroads for the continuous carriage of goods. The test of a through route is whether the participating carriers hold themselves out as offering through transportation service. Either combination rates, *i.e.*, separate rates fixed independently by the participating carriers, or joint rates, *i.e.*, single rates charged shippers with appropriate divisions of the single rates by the participating carriers, may apply over through routes (see 49 U.S.C. § 6(1)).

connection with eastbound and westbound shipments passing through Spokane via the S.P. & S. System and the Northern Lines (1 R 142-150; 300 I.C.C. at 499-501). With respect to most of the shipments passing through Spokane over the S.P. & S. System and the Milwaukee Road, shippers would have to pay combination rates, and the combination rates produce higher charges than those resulting from the joint rates maintained by the S.P. & S. System with the Northern Lines (I R 88-89; 300 I.C.C. at 457). This controversy centers on issues relating to the higher charges applicable to such shipments over the Milwaukee Road and the S.P. & S. System.[3]

Freight cars are interchanged daily between the Milwaukee Road and the S.P. & S. System with expedition and a minimum of expense (III R 1179-1182). During the representative year of 1952, relied upon by the Commission (I R 93; 300 I.C.C. at 460), 513 cars of freight shipped on through bills of lading were handled by the S.P. & S. System and the Milwaukee Road with the interchange made at Spokane (I R 93-95; 300 I.C.C. at 460-461). The 513 cars contained the following commodities: livestock, forest products, insecticides and fungicides, food products in cans and packages, candy, confectionery, laundry equipment,

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[3] Joint rates have been established as to shipments over the S.P. & S. System and the Milwaukee Road with respect to certain commodities and circumstances (I R 90, 149-151; 300 I.C.C. at 458, 501-502). No issue is presented in this case with respect to the level of such joint rates. However, diversion and other transit privileges are sought by the Milwaukee Road with respect to shipments involving the joint rates to the same extent that such privileges are accorded to shipments over the Northern Lines.

starch, chemicals, soap, cleansing and washing compounds, furniture, gasoline and other petroleum products, containers, motor vehicles, and miscellaneous commodities (I R 93; 300 I.C.C. at 460; Ex. 1, I R 386-387; VII R 3117-3144). The Assistant General Freight Agent of the Milwaukee Road testified that only 387 of such cars moved under joint rates (I R 321-322).

The Commission lists in Appendix B to its report (I R 149-151; 300 I.C.C. at 501-502) joint rates which have been established between the Milwaukee Road and the S.P. & S. System over routes which are admittedly through routes to the extent that the joint rates are applicable (I R 89-90; 300 I.C.C. at 458). For example, joint rates apply over through routes on all general commodities for export or import between various points or areas served by the S.P. & S. System and the Milwaukee Road and its connections (I R 143-148; 300 I.C.C. at 501). Also, "there has been published or approved a full line of joint through rates on * * * [forest products] from all points on the S.P. & S. to all local points and some common points on the lines of the Milwaukee east of Spokane" (I R 90; 300 I.C.C. at 458, fn. 5). The joint rates as to forest products do not include diversion or other transit privileges with respect to shipments to numerous destinations on the Milwaukee Road (I R 123-127; 300 I.C.C. at 484-487). Other joint rates, over admittedly through routes (I R 89-90; 300 I.C.C. at 458), are set forth in Appendix B to the Commission's report (I R 149-151; 300 I.C.C. at 501-502). Joint rates have not generally been established between the Milwaukee Road

and the S.P. & S. System applicable to shipments of livestock, grain, or fresh fruits and vegetables (*ibid.*).

The Commission determined that the Spokane gateway is, except for shipments made under the joint rates, "commercially closed" to the Milwaukee Road by high combination rates. The Commission stated:

> "Routes are available to and from points on the S.P. & S., via Spokane in connection with the complainant [Milwaukee Road] and its eastern connections, but generally shippers would have to pay combination rates if such routes were used. The maintenance of those rates produces higher charges than those resulting from the joint rates maintained by the S.P. & S. over routes via Spokane in connection with the northern lines. The higher rates and charges act as deterrents to shippers, and, in effect, close the Spokane gateway in a commercial sense insofar as the complainant is concerned" (I R 88; 300 I.C.C. at 457).

Further, it was said by the Commission:

> "As stated above and as testified by numerous shippers in this proceeding, the Spokane-gateway routes, insofar as the complainant's lines are concerned, with the exceptions [relating to the joint rates] listed in appendix B, are not considered as open or through routes commercially, but as routes that are effectually closed to shippers because of the higher combination rates which apply thereover. A finding that such routes should be opened to shippers on a commercial basis by establishing

the competitive joint rates sought would result in the establishment of such routes as effective through routes" (I R 90; 300 I.C.C. at 458).

It is the position of the appellants that, with respect to all commodities, through routes are existent between the S.P. & S. System and the Milwaukee Road, and that under §§ 1(4), 3(1), and 3(4) of the Interstate Commerce Act (49 U.S.C. §§ 1(4), 3(1), and 3(4)), additional joint rates should be established by the S.P. & S. System with the Milwaukee Road which are competitive with the joint rates of the S.P. & S. System with the Northern Lines. Based on the premise that such through routes are in existence as to all commodities, it is our contention that the Commission should have prescribed such additional competitive joint rates under § 15(1) of the Act (49 U.S.C. § 15(1)), because of the violations of §§ 1(4), 3(1), and 3(4) of the Act by the S.P. & S. System. The Commission determined that, except for shipments made under the joint rates, through routes do not exist between the S.P. & S. System and the Milwaukee Road (I R 88-94; 300 I.C.C. at 457-461) and, therefore, the Commission did not determine whether additional competitive joint rates should be established between the S.P. & S. System and the Milwaukee Road pursuant to § 15(1) of the Act (49 U.S.C. § 15(1)).

b. *The Short-Hauling Limitation in § 15(4)*

Assuming, *arguendo,* that with limited exceptions through routes do not exist between the S.P. & S. System and the Milwaukee Road, the appellants contend

that the Commission should establish additional through routes and competitive joint rates between the S.P. & S. System and the Milwaukee Road pursuant to § 15(3) of the Act (49 U.S.C. § 15(3)). Under § 15(3) of the Act, the Commission is authorized to establish through routes and joint rates "whenever deemed by it to be necessary or desirable in the public interest." In considering the issue as to whether through routes and joint rates should be established under § 15(3) of the Act, the Commission determined that the "short-hauling" provisions of § 15(4) of the Act are applicable (49 U.S.C. § 15(4)), and the Commission's conclusion that through routes are not necessary or desirable in the "public interest" is based on the limitations in § 15(4) of the Act as to "short-hauling" (I R 96-107, 141-142; 300 I.C.C. at 463-471, 498).

Section 15(4) is a limitation on the Commission's power to prescribe through routes and joint rates under § 15(3) of the Act, and the limitation prevents the Commission, with certain exceptions, from requiring a railroad to "short-haul" itself, *i.e.*, "to embrace in such [through] route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route."[4] The Commission determined that the S.P. & S. System is operated in conjunction and under a common manage-

[4] The limitation in § 15(4) of the Act is not relevant with respect to existing through routes between the Milwaukee Road and the S.P. & S. System, see *infra*, p. 33.

ment or control with the Northern Lines and that the Northern Lines, in conjunction with the S.P. & S. System, would be "short-hauled" if the relief requested by the appellants is granted (I R 96-97, 101-107; 300 I.C.C. at 463-471).

The two railroads referred to as the Northern Lines, *viz.*, the Great Northern Railway Company and the Northern Pacific Railway Company, are competitive lines (I R 96-97; 300 I.C.C. at 462-463; IV R 1985). "Both the stock and the bonds of the S.P. & S. are owned in equal shares by the Great Northern and the Northern Pacific" (I R 97; 300 I.C.C. at 463). The S. P. & S. System depends equally on the Northern Lines for financial support and car supply (I R 98; 300 I.C.C. at 463-464). The president of the Great Northern Railway Company and the president of the Northern Pacific Railway Company alternate, year by year, as president and vice president of the S.P. & S. System (I R 99-100; 300 I.C.C. at 465-466). "Although in each year one northern-line president is the president of the S.P. & S. and the other is vice president, there is no difference in the authority exercised by each except in the title used in signing documents" (I R 100; 300 I.C.C. at 466). The S.P. & S. System has its own vice president in charge of its operating department (I R 99; 300 I.C.C. at 465).

The "freight traffic practices and policies of the S.P. & S. are directed and controlled jointly by the traffic departments of the northern lines, [but] the local officials of the S.P. & S. are authorized to act within the framework of policies determined by the

northern lines without specific approval from the traffic departments of the latter on each question which arises" (I R 100; 300 I.C.C. at 466). The S.P. & S. System is a member, with full voting powers, of the North Pacific Coast Freight Bureau, which is the tariff issuing agency of the northwestern railroads (I R 354-355), and the S.P. & S. System issues its own rate instructions to the Transcontinental Freight Bureau in matters involving it (IV R 1599-1600; VI R 2628). Generally, with respect to the S.P. & S. System's local territory, the S.P. & S. System is permitted, without specific approval in advance, to place rate and practice matters on the North Pacific Coast Freight Bureau docket to be handled in the regular course of business (I R 100; 300 I.C.C. at 466). All matters pertaining to transcontinental rates and practices are handled for the S.P. & S. System by the representatives of the Northern Lines (*ibid.*). With respect to rates on traffic other than transcontinental traffic and not applicable to the S.P. & S. System's local territory, the proposed rates of the S.P. & S. System must be submitted in advance to the Northern Lines, but if the Northern Lines are not in agreement, the S.P. & S. System "is permitted to exercise its best judgment in voting" (*ibid.*).

All decisions by the Northern Lines relating to the S.P. & S. System are made jointly (IV R 1983-1987, 2023; V R 2040-2041). In case of disagreement between the Northern Lines, no action is taken by them (IV R 1983-1985; V R 2049, 2168-2169), and the S.P. & S. System exercises its independent judgment in such matters (VI R 2511, 2631-2633). The S.P. & S. System has its own corporate organization (V R 2040);

assumes all liability on its equipment trust obligations (V R 2076-2077); and does its own traffic solicitation in its local territory (VI R 2516).

In its relations with other carriers, the S.P. & S. System acts independently of the Northern Lines and is treated as an independent line (I R 354; V R 2171-2172, 2176-2177; VII R 2874-2877). On numerous occasions it has joined with the Great Northern Railway Company and the Milwaukee Road in publishing rates competitive with those applicable via the S.P. & S. System and the Northern Pacific Railway Company (VII R 2877). The S.P. & S. System negotiates divisions of rates with all lines, including the Northern Lines (VI R 2649). The Northern Pacific and the Great Northern have separate, competitive managements (IV R 1985), and the S.P. & S. has a management separate from that of the Northern Lines (I R 99-100; 300 I.C.C. at 465-466).

Inasmuch as the Commission determined that the S.P. & S. System is operated in conjunction and under a common management or control with the Northern Lines, the Commission held that it could not establish through routes and joint rates unless one of the relevant exceptions to § 15(4) applies, *viz.*, unless the "through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation" or "except as provided in section 3" of the Act relating to unlawful discrimination (I R 88-89, 107, 142; 300 I.C.C. at 457, 471, 498).

The Commission concluded that neither of the relevant exceptions to § 15(4) of the Act is applicable

(I R 141-142; 300 I.C.C. at 498). Although it was concluded by the Commission that the additional through routes are not needed in order to provide adequate and more efficient or economic transportation with respect to various commodities, including forest products, livestock, and fresh fruits and vegetables, nonetheless the Hearing Examiner reached a contrary conclusion (I R 277-281). The Commission's conclusion that the S.P. & S. System is not violating § 3 of the Act, with respect to unlawful discrimination to shippers using the Milwaukee Road for the shipment of such commodities, is also contrary to the determination by the Hearing Examiner (*ibid.*).

c. Discrimination and the Public Interest

Testimony was introduced at the administrative hearing showing that, during the present period of increased production and expanding markets, the agricultural community requires flexible and expeditious channels for the distribution of its crops (I R 115; 300 I.C.C. at 478). All areas of consumption are needed for the disposal of production and all means of reaching those areas are important (III R 1068-1078). Large quantities of agricultural commodities are produced in and distributed from Oregon and Washington, and Spokane is an important gateway for their distribution (I R 115; 300 I.C.C. at 478). The inability to use an important gateway such as Spokane at joint competitive rates between the S.P. & S. System and the Milwaukee Road prevents the necessary flexible distribution of agricultural commodities by producers and shippers (*ibid.*). Numerous shippers and consignees

who are adjacent to the lines of the Milwaukee Road testified that because of the rate disparities they cannot compete effectively with shippers and consignees located on the Northern Lines (I R 379-381, 454-457, 469-471; II R 620-621, 637, 931; IV R 1572).

The evidence on behalf of the appellants shows that if livestock producers on the S.P. & S. System utilize the range along the Milwaukee Road for feeding-in-transit while enroute, *e.g.*, to Chicago, they must pay higher freight charges than producers who utilize the range adjacent to the Northern Lines (I R 133-136; 300 I.C.C. at 492-494). There is competition, at times, for desirable range (I R 427-428; III R 1120-1122).

Producers of grain who are adjacent to the Milwaukee Road, and who desire to ship to the West, can sell to mills on the lines of the S.P. & S. System, after the required inspection at Spokane, only at a penalty in freight charges, and the penalty affects their market prices (I R 127-129; 300 I.C.C. at 487-489; II R 636-637, 695-697; III R 1071). Because of the lack of joint rates with diversion privileges applicable to shipments of grain, the amount of grain shipped on the Milwaukee Road towards Spokane is limited to that which will probably be disposed of at destinations on the Milwaukee Road, resulting in frequent shortages at such destinations (I R 128-129; 300 I.C.C. at 488). Shipments of forest products and fresh fruits and vegetables originating on the S.P. & S. System and moving to local points on the Milwaukee Road cannot be diverted eastbound off the Milwaukee Road without rate penalties because the tariffs provide that in such instances combination rates, which are higher, must be applied (I R

108, 123-126; 129-130; 300 I.C.C. at 472, 484-486, 489). The absence of joint rates between the Milwaukee Road and the S.P. & S. System on various agricultural commodities also prevents shippers from utilizing other in-transit privileges on the Milwaukee Road, such as milling-in-transit or partial loading or unloading in-transit (I R 113-117; 300 I.C.C. at 476-479).

In the circumstances, it is the position of the Secretary of Agriculture that it is in the public interest to open the Spokane gateway to shipments between the S.P. & S. System and the Milwaukee Road by establishing additional competitive joint rates applicable to such shipments (I R 115; 300 I.C.C. at 478). It is believed that the opening of the Spokane gateway for the purposes referred to in this brief would be consonant with the Congressional policy to provide for "an integrated administration of all laws enacted by Congress to aid the distribution of agricultural products through research, market aids and services, and regulatory activities, to the end that marketing methods and facilities may be improved, that distribution costs may be reduced and the price spread between the producer and consumer may be narrowed". (60 Stat. 1087, 7 U.S.C. § 1621).[5]

[5] The level and structure of freight rates have been of great concern to the agricultural industry for a long time. *The Transportation Problem of Agriculture*, 1940 Yearbook of Agriculture, p. 723; Aitchison, *The Evolution of the Interstate Commerce Act: 1887-1937*, 5 George Washington L. Rev. 289, 296 (1937).

3. The Decision of the District Court

The District Court sustained the findings and conclusions of the Commission (I R 157-170). The Court's opinion is devoted almost exclusively to the issue as to whether the S.P. & S. System is operated in conjunction and under a common management and control with the Northern Lines within the meaning of § 15(4) of the Act (I R 161-170). The remaining issues are disposed of by the Court in a single sentence (I R 170). With respect to the issue under § 15(4) of the Act, the Court stated (I R 162):

> "The first matter considered by the Commission in regard to the issue of common management and control was the factual relationship between the S.P. & S. and the Northern Lines. Without repeating the detailed findings of fact of the Commission (see pages 463-467 of 300 I.C.C. 453), it can be fairly stated that while neither the Northern Pacific nor the Great Northern can individually control the S.P. & S., the Northern Lines certainly can and do collectively (or jointly) control their subsidiary including its traffic policy.
>
> "The question presented then is whether joint control by two railroads over a third railroad falls within the long haul protection of Section 15(4). In this latter respect there is no question but that the language of the statute is framed in the singular, and, therefore, such a situation does not fall within the precise wording of the Act."

The Court held that the "Commission was correct in concluding that the S.P. & S. System is operated in

conjunction and under a common management and control with the Northern Lines within the meaning of Section 15(4) of the Interstate Commerce Act" (I R 170).

SUMMARY OF ARGUMENT

I

A. The Commission determined that, with limited exceptions, through routes do not exist between the S.P. & S. System and the Milwaukee Road with respect to shipments via Spokane, Washington (I R 88-94; 300 I.C.C. at 457-461). The basis for the Commission's decision is that such shipments are subject to high combination rates which "act as deterrents to shippers [using the Milwaukee Road] and, in effect, close the Spokane gateway in a commercial sense" (I R 88; 300 I.C.C. at 457). The Commission's holding that through routes are not in existence because the Spokane gateway is commercially closed to shippers using the Milwaukee Road is contrary to *Virginian Ry.* v. *United States,* 272 U. S. 658, 661-667. It was held in the *Virginian Railway* case that through routes were in existence notwithstanding the fact that the routes were "closed commercially." *Ibid.* Here, as in *American Trucking Assns.* v. *United States,* 364 U. S. 1, 13-17, the case should be remanded to the Commission so that it may apply the appropriate criteria to the facts.

Whenever a through route exists, the shippers are entitled to have "just and reasonable" rates applicable to shipments over the through route. 49 U.S.C. §§ 1(4) and 15(1). There is no quantitative proviso in the statutory language. The rates must be just and reason-

able over a through route irrespective of the volume of the shipments. Excessive rates may have a pronounced influence on the volume of shipments, but it is the duty imposed by the Act of Congress on every common carrier to furnish the transportation over a through route at "just and reasonable rates." *Ibid.* There is, moreover, no exception from the statutory duty to provide the transportation over a through route at rates which are just and reasonable. The fact that only a small volume of shipments is made because of unreasonably high rates does not militate against the right of the shippers to receive the transportation at rates which are reasonable. Here, as in *Virginian Ry.* v. *United States*, 272 U. S. 658, 668, the "fact that the combination rates [over the through routes] were excessive" constituted an "obstacle to the movement," but it is sufficient, in order to require just and reasonable rates, that the through route existed (*ibid.*).

B. Inasmuch as the Commission decided the case on the basis that the routes are commercially closed, the findings of the Commission are not adequate for the resolution of this proceeding. The Commission's decision is invalid because it lacks adequate findings of fact. The decision is, additionally, invalid for lack of evidentiary support. The evidence shows shipments on through bills of lading at combination rates (I R 321-322; VII R 3117-3144). The record shows that through routes have been established at the Spokane gateway (see, *e.g.*, I R 149-151, 321-322; III R 1179-1182; VII R 3117-3144). The Commission's decision that, with limited exceptions, through routes do not

exist is not supported by substantial evidence on the record as a whole.

C. Assuming, *arguendo*, that the issue as to whether through routes exist is to be resolved without remanding the case to the Commission, the record compels the conclusion that through routes exist. Shipments on the combination rates are made on through bills of lading via the Milwaukee Road and the S.P. & S. System (I R 93-95, 321-322). These shipments establish that through routes exist. *Through Routes and Through Rates*, 12 I.C.C. 163, 167-168. Joint rates have also been established in various circumstances between the Milwaukee Road and the S.P. & S. System as to shipments via Spokane (I R 149-151; 300 I.C.C. at 501-502). For example, such joint rates apply on all general commodities for export or import between various points or areas served by the S.P. & S. System and the Milwaukee Road and its connections (I R 143-148; 300 I.C.C. at 501). To the extent that joint rates are applicable, the routes are admittedly through routes (I R 89-90; 300 I.C.C. at 458). In the circumstances, the Spokane gateway has been opened as a through route, and through routes exist as to all shipments via Spokane irrespective of whether the shipments are on higher combination rates.

II

Assuming, *arguendo*, that, with limited exceptions, through routes do not exist between the S.P. & S. System and the Milwaukee Road, the Commission determined that it could not establish through routes be-

cause of the short-hauling limitation in § 15(4) of the Act (49 U.S.C. § 15(4)). Section 15(4) provides that, with certain exceptions, the Commission shall not require

> "* * * *any carrier* by railroad, without its consent, *to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith,* which lies between the termini of such proposed through route [emphasis supplied] * * *" (49 U.S.C. § 15(4)).

In the case at bar, 50 per cent of the stock of the S.P. & S. System is owned by the Great Northern and 50 per cent is owned by the Northern Pacific. The Commission found that the S.P. & S. System is under a common management or control with the Great Northern and the Northern Pacific, within the meaning of § 15(4) of the Act (I R 96-107; 300 I.C.C. at 463-471).

A. The language in § 15(4) of the Act against short-hauling a carrier is in the singular, and is applicable only to a railroad and to an intermediate railroad operated in conjunction and under a common management or control with the other railroad. The appellees' argument, however, relates the short-hauling limitation to the controlling power, and the appellees would make the limitation applicable to two or more railroads which jointly control another railroad. Under the appellees' argument the Commission would be prohibited from requiring

any carrier *or carriers* by railroad, without consent, to embrace in such route substantially less than the entire length of its railroad, *or their railroads,* and of any other railroad operated in conjunction and under a common management or control therewith, *or under a joint management or control therewith,* which lies between the termini of such proposed through route.

The Congress used the phrase "carrier or carriers" seven times in this section of the Act (36 Stat. 551-553), but the singular term "carrier" was used by Congress in the short-hauling limitation. If the Congress had intended the short-hauling limitation to relate to control by any "carrier or carriers" the Congress would have said so. Similarly, if the Congress had intended that the short-hauling limitation would relate to a railroad operated "under a joint management or control" with other railroads, the Congress would have used those terms. For example, in § 5(2) of the Act, the Congress provided that it shall be lawful, with the approval of the Commission, "for any carrier, or two or more carriers jointly, to acquire control of another" (49 U.S.C. § 5(2)).

When a provision is carefully included in some places in a statute and omitted at other places in the statute it should not be implied in the place at which it is omitted. *Lang* v. *Commissioner,* 289 U. S. 109, 112; *United States* v. *Atchison, T. & S. F. Ry. Co.,* 220 U. S. 37, 44. Here, as in *Iselin* v. *United States,* 270 U. S. 245, 250-251, the "statute was evidently drawn with care" and to interpolate the language contended for

by the appellees would not be a construction of the statute "but, in effect, an enlargement of it by the Court, so that what was omitted * * * may be included within its scope." It is not for the courts to beat down distinctions in a statute. *Bruner* v. *United States,* 343 U. S. 112, 116; *First National Bank* v. *Missouri,* 263 U. S. 640, 657; *Thornley* v. *United States,* 113 U. S. 310, 315.

This careful differentiation between the singular and the plural in this section of the Act is also supported by the legislative history (see, *e.g.,* Sen. Rep. No. 355, 61st Cong., 2d Sess., pp. 9-10; H. Conf. Rep. No. 1588, 61st Cong., 2d Sess., p. 23; 45 Cong. Rec. 3475-3476, 4714, 7571). The short-hauling limitation as to the Commission's authority to establish through routes was regarded as a limited exception to an important remedial power, and the exception should not be enlarged to cover circumstances not within its terms.

The Transportation Act of 1940 broadened the definition of "control," as used in various sections of the Interstate Commerce Act (49 U.S.C. § 1(3)(b)), so that "practical" control such as that involved in *Rochester Telephone Co.* v. *United States,* 307 U. S. 125, 145-146, is sufficient to constitute "control." Even under that liberalized definition of control, neither the Great Northern nor the Northern Pacific can individually control the S.P. & S. System. Moreover, the liberalized definition of control does not apply to § 15(4) of the Act, involved in this case. The legislative history of the amendatory legislation in 1940 shows that the Congress did not make the liberalized definition of control applicable to § 15(4) of the Act because

it was "thought undesirable to make any change in the interpretation of present law" in this respect (H. Rep. No. 2832, 76th Cong., 3rd Sess., p. 63; H. Rep. No. 2016, 76th Cong., 3rd Sess., p. 58). There had been no holding by the Commission that joint control by two or more railroads constitutes "control" within the meaning of § 15(4) of the Act. To the contrary, the Commission had held that joint control is not sufficient to constitute "control," within the meaning of § 15(4). *Absorption of Switching Charges*, 157 I.C.C. 129, 132; *Manufacturers Ry. Co.* v. *Ahnapee & W. Ry. Co.*, 172 I.C.C. 554, 560-564. See, also, *Hughes Creek Coal Co.* v. *K. & M. Ry. Co.*, 29 I.C.C. 671, 672-681. Hence there is no basis for expanding the limited exception in § 15(4) to include joint control of one railroad by two other railroads.

B. There is an additional ground for holding invalid the Commission's conclusion as to common management or control of the S.P. & S. System by the Great Northern and the Northern Pacific. The Commission's decision, in this respect, is not adequately supported by the record or findings of fact. The record and the findings show that the S.P. & S. System has its vice president in charge of its operating department, and that although the freight traffic practices and policies of the S.P. & S. System are subject to the joint control of the Northern Lines, *i.e.*, the Great Northern and the Northern Pacific, the S.P. & S. officials are authorized to act within the framework of policies determined by the Northern Lines without specific approval as to each question which arises (I R 99-100; 300 I.C.C. at 465-466). In various circumstances in which the

Northern Lines cannot agree, the S.P. & S. System is permitted to exercise its independent judgment. Such findings and evidence are not adequate to support the Commission's conclusion as to common management or control.

III

Assuming, *arguendo*, that the S.P. & S. System is under a common management or control with the Northern Lines within the meaning of § 15(4) of the Act, § 15(4) is expressly inapplicable, *first*, in situations involving § 3 of the Act relating, *inter alia*, to undue preferences or prejudices (49 U.S.C. § 3(1)), or, *second*, if the Commission finds that the proposed through route "is needed in order to provide adequate, and more efficient or more economic, transportation" (49 U.S.C. § 15(4)). The Commission's conclusions as to undue preferences or prejudices and as to the need for additional through routes are not adequately supported by findings of fact or by substantial evidence on the record as a whole.

The Commission recognized that valuable transit privileges would be made available to shippers using the Milwaukee Road if the relief requested in this proceeding is granted (I R 113-117; 300 I.C.C. at 476-479). The Commission stated in its report that the "Milwaukee offers a large number of transit privileges at points on its line," including "stops for partial loading or unloading, storage, grading, packing, sorting, consolidating, concentration, milling, fabrication, assembling, and distributing of many commodities, and in the case of livestock, grazing, feeding, and trying the

market, among others" (I R 113; 300 I.C.C. at 476). The Commission recognized that such transit privileges, "considered valuable by certain shippers in marketing operations and permitting freer flow of traffic through the transit points, are available only when joint rates via the transit points are maintained" (*ibid.*). The absence of joint rates with transit privileges results in "closed or pocket markets" along the lines of the Milwaukee Road (I R 124; 300 I.C.C. at 485).

In a similar proceeding with respect to the Ogden gateway, the Commission determined that additional through routes and joint rates as to agricultural commodities should be established (*Denver & R. G. W. R. Co.* v. *Union Pac. R. Co.*, 287 I.C.C. 611, 620-660), and the Commission's order was sustained on judicial review because of the need for reconsignment and transit privileges, particularly with respect to the marketing of agricultural commodities (*Denver & R. G. W. R. Co.* v. *Union P. R. Co.*, 351 U. S. 321, 330-335). The same circumstances which required the establishment of through routes with respect to agricultural shipments via the Ogden gateway over the Denver and Rio Grande Western Railroad Company require the establishment of through routes with respect to agricultural shipments over the Milwaukee Road via the Spokane gateway. The Commission, in its report, does not adequately explain its failure to follow its prior decision with respect to the Ogden gateway. In addition, in view of the evidence with respect to the need for the transit privileges in the marketing of agricultural commodities through the Spokane gateway and the lack of

substantial evidence to the contrary, the Commission's order is not supported by substantial evidence on the record as a whole.

Numerous shippers and consignees who are adjacent to the lines of the Milwaukee Road testified that because of the rate disparities they cannot compete effectively with shippers and consignees located on the Northern Lines (see, *e.g.*, I R 379-381, 454-457, 469-471; II R 620-621, 637, 931; IV R 1572). The Commission has the authority to prevent such undue preferences or prejudices in the circumstances of this case. "Localities require protection as much from combinations of connecting carriers as from single carriers whose 'rails' reach them. Clearly the power of Congress and of the Commission to prevent interstate carriers from practicing discrimination against a particular locality is not confined to those whose rails enter it." *St. Louis S. W. Ry Co.* v. *United States*, 245 U. S. 136, 144. See, also, *New York* v. *United States*, 331 U. S. 284, 341-342.

ARGUMENT

I. The Commission Erred In Determining That, With Limited Exceptions, Through Routes Do Not Exist Between The S.P. & S. System And The Milwaukee Road.

We shall show in this section of our brief that the Commission applied an erroneous criterion in determining the issue—basic to the entire case—as to whether through routes for all commodities exist between the S.P. & S. System and the Milwaukee Road. In the circumstances, we submit that the case should be remanded to the Commission with directions to apply the appropriate criteria to the facts. We shall also show that

the Commission's order is not adequately supported by findings of fact or substantial evidence. Assuming, however, that the issue, as to whether through routes exist, may be decided without remanding the case to the Commission, we shall show that the record compels the conclusion that through routes are in existence between the S.P. & S. System and the Milwaukee Road as to all commodities.

A. *The Commission Applied an Erroneous Criterion in Determining Whether Through Routes Exist Between the S.P. & S. System and the Milwaukee Road.*

The Commission concluded that, with limited exceptions, through routes do not exist between the S.P. & S. System and the Milwaukee Road (I R 88-91; 300 I.C.C. at 457-461).[6] The Commission afforded decisive weight to its finding that the Spokane gateway is, with certain exceptions, "commercially closed" to the Milwaukee Road by high combination rates. The Commission found that:

> "Routes are available to and from points on the S.P. & S., via Spokane in connection with the complainant [Milwaukee Road] and its eastern connections, but generally shippers would have to pay combination rates if such routes were used. The maintenance of those rates produces higher charges than those resulting from the joint rates maintained by the S.P. & S. over routes via Spo-

[6] The exceptions relate to the presently established joint rates between the S.P. & S. System and the Milwaukee Road referred to in fn. 3, *supra*, p. 7.

kane in connection with the northern lines. The higher rates and charges act as deterrents to shippers, and, in effect, close the Spokane gateway in a commercial sense insofar as the complainant is concerned" (I R 88; 300 I.C.C. at 457).

The Commission iterated its holding that "as testified by numerous shippers in this proceeding, the Spokane-gateway routes, insofar as the complainant's lines are concerned, with the exceptions [relating to joint rates] listed in appendix B, are not considered as open or through routes commercially, but as routes that are effectually closed to shippers because of the higher combination rates which apply thereover" (I R 90; 300 I.C.C. at 458). The Commission stated that a "finding that such routes should be opened to shippers on a commercial basis by establishing the competitive joint rates sought would result in the establishment of such routes as effective through routes" (*ibid.*). Because of the foregoing circumstances, the Commission concluded that except with respect to the joint rates which have been established between the S.P. & S. System and the Milwaukee Road, "there are no through routes, as that term is used in the act, between the areas comprised in the complaint, in connection with the S.P. & S. System and the Milwaukee via Spokane" (I R 94; 300 I.C.C. at 461).

The Commission's holding that through routes are not in existence because the Spokane gateway is "commercially closed" to shippers using the Milwaukee Road is contrary to *Virginian Ry.* v. *United States*, 272 U.S. 658, 661-667, in which it was held that through routes

were in existence notwithstanding the fact that the routes were closed commercially. In that case, the shipment of coal from 54 mines to the West was possible through a junction of the Virginian Railway and the Chesapeake & Ohio Railway. The Court stated that the routes were "closed commercially, because these two carriers have not established any joint rates to the West from any of these 54 mines; and the combination of [1] the Virginian's local rate from the mines to the junction with [2] the Chesapeake & Ohio's rates from the junction to the West, results in charges so high as to be prohibitive" (272 U.S. at 661). Nonetheless, the Court stated that "[t]hrough routes to the West were already in existence. * * * The fact that the combination rates were excessive constituted the only obstacle to the movement." *Id.* at 666. Hence the fact that the routes were closed commercially and that shipments were not made over the routes because the combination charges were prohibitive did not negative the existence of the through routes. In *Thompson* v. *United States*, 343 U.S. 549, 560, fn. 18, the Court recognized that in the *Virginian Railway* case "through routes were there found to be in existence" notwithstanding the fact that such through routes were "commercially closed * * * because of unreasonable and discriminatory rates charged by the Virginian over its portion of the route." Through routes were also found to be in existence even though they were commercially closed in *Great Northern Ry. Co.* v. *United States*, 81 F. Supp. 921, 924-925 (3-Judge Court, D. Del.), affirmed, 336 U.S. 933. See, also, *Brown Lumber Co.* v. *L. & N. R. Co.*, 299 U.S. 393, 400.

Whenever a through route exists, the shippers are entitled to have "just and reasonable" rates applicable to shipments over the through route. 49 U.S.C. §§ 1(4) and 15(1). There is no quantitative proviso in the statutory language. The rates must be just and reasonable over a through route irrespective of the volume of the shipments. Excessive rates may have a pronounced influence on the volume of shipments, but it is the duty imposed by the Act of Congress on every common carrier to furnish the transportation over a through route at "just and reasonable rates." *Ibid.* There is, moreover, no exception from the statutory duty to provide the transportation over a through route at rates which are just and reasonable. The fact that only a small volume of shipments is made because of unreasonably high rates does not militate against the right of the shippers to receive the transportation at rates which are reasonable. Here, as in *Virginian Ry. v. United States*, 272 U. S. 658, 668, the "fact that the combination rates [over the through routes] were excessive" constituted an "obstacle to the movement," but it is sufficient, in order to require just and reasonable rates, that the through route existed (*ibid.*).

The Commission's decision is based on the erroneous proposition that a through route is not in existence if it is commercially closed by high or unreasonable rates. An administrative determination cannot be sustained on judicial review if the agency's conclusions "rest on erroneous legal foundations." *Labor Board v. Babcock & Wilcox Co.*, 351 U. S. 105, 112. It is settled that the "grounds upon which an administrative order must be judged are those upon which the record discloses

that its action was based." *American Trucking Assns.* v. *United States,* 364 U.S. 1, 14, quoting from *Securities & Exchange Comm'n* v. *Chenery Corp.,* 318 U.S. 80, 87. The Commission's conclusion that, with limited exceptions, through routes do not exist between the S.P. & S. System and the Milwaukee Road is basic to the Commission's decision in this case (I R 88-91; 300 I.C.C. at 457-461). A reversal, in this respect, would require reconsideration of the case by the Commission inasmuch as the Commission decided the case on the basis of findings under § 15(3) and 15(4) of the Act, *e.g.,* as to the need for additional transportation services (I R 107, 141-142; 300 I.C.C. at 471, 498), and such findings are irrelevant if through routes already exist. *Great Northern Ry. Co.* v. *United States,* 81 F. Supp. 921, 924-925 (3-Judge Court, D. Del.), affirmed, 336 U.S. 933; *Virginian Ry.* v. *United States,* 272 U.S. 658, 666-667. In the circumstances, the case should be remanded to the Commission so that the Commission may apply the appropriate criteria to the facts. *American Trucking Assns.* v. *United States,* 364 U.S. 1, 13-17; *Federal Power Commission* v. *Idaho Power Co.,* 344 U.S. 17, 20; *United States* v. *Great Northern R. Co.,* 343 U.S. 562, 578.[7]

[7] If the case is remanded to the Commission and the Commission determines that through routes embracing all commodities exist between the S.P. & S. System and the Milwaukee Road, the Commission will be free to consider whether competitive joint rates between the S.P. & S. System and the Milwaukee Road should be established under §§ 1(4), 3(1), 3(4), and 15(1) of the Act.

B. *The Commission's Determination That, with Limited Exceptions, Through Routes Do Not Exist Between the S.P. & S. System and the Milwaukee Road is Not Supported by Adequate Findings or Substantial Evidence.*

The findings of fact by the Commission do not reveal an adequate basis for supporting the Commission's view that, with limited exceptions, through routes do not exist between the Milwaukee Road and the S.P. & S. System. As we have shown, *supra*, pp. 29-30, nothing is revealed in the findings by the Commission as to why the available routes between the Milwaukee Road and the S.P. & S. System are not through routes except that the routes are "commercially closed", which is not a sufficient basis for the Commission's conclusion. It is axiomatic that an order of the Commission is illegal if it is not based on adequate findings.[8]

In addition, the Commission's determination, in this respect, is not supported by substantial evidence on the record as a whole. As we show, *infra*, pp. 35-40, the

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[8] *Secretary of Agriculture* v. *United States*, 350 U.S. 162, 167-173; *Secretary of Agriculture* v. *United States*, 347 U.S. 645, 652-655; *Automatic Canteen Co.* v. *Federal Trade Commission*, 346 U.S. 61, 81; *New York* v. *United States*, 331 U.S. 284, 301-310; *Interstate Commerce Commission* v. *Mechling*, 330 U.S. 567, 583; *North Carolina* v. *United States*, 325 U.S. 507, 520; *Alabama* v. *United States*, 325 U.S. 535, 537; *Eastern-Central Assn.* v. *United States*, 321 U.S. 194, 209-212; *Yonkers* v. *United States*, 320 U.S. 685, 689-692; *United States* v. *Carolina Carriers Corp.*, 315 U.S. 475, 488-489; *Atchison Ry.* v. *United States*, 295 U.S. 193, 201-202; *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U.S. 499, 510-511; *United States* v. *B. & O. R. Co.*, 293 U.S. 454, 462-465; *Florida* v. *United States*, 282 U.S. 194, 215.

evidence compels the conclusion that through routes exist between the Milwaukee Road and the S.P. & S. System. An administrative order which is not adequately supported by the record is, of course, invalid. *Universal Camera Corp.* v. *Labor Bd.*, 340 U.S. 474, 488-491.

C. *Assuming,* Arguendo, *That the Issue as to the Existence of Through Routes is To Be Determined Without Remanding the Proceeding to the Commission, the Record Compels the Conclusion that Through Routes Exist Between the S.P. & S. System and the Milwaukee Road as to All Commodities.*

Assuming that the issue as to the existence of through routes is to be resolved at this time by the Court, the relevant facts and circumstances in the record compel the conclusion that through routes are in existence between the S.P. & S. System and the Milwaukee Road as to all commodities, and such through routes include all shipments under the combination rates. No express agreement by connecting carriers is necessary in order to establish a through route. *Thompson* v. *United States,* 343 U.S. 549, 556; *St. Louis S. W. Ry. Co.* v. *United States,* 245 U.S. 136, 139, fn. 2.

A " 'through route' is an arrangement, express or implied, between connecting railroads for the continuous carriage of goods from the originating point on the line of one carrier to destination on the line of another. Through carriage implies a 'through rate.' This

'through rate' is not necessarily a 'joint rate.'[9] It may be merely an aggregation of separate rates fixed independently by the several carriers forming the 'through route'; as where the 'through rate' is 'the sum of the locals' on the several connecting lines or is the sum of lower rates otherwise separately established by them for through transportation." *Thompson* v. *United States*, 343 U.S. 549, 556. See, also, *United States* v. *Great Northern R. Co.*, 343 U.S. 562, 572-573. "In short, the test of the existence of a 'through route' is whether the participating carriers hold themselves out as offering through transportation service. Through carriage implies the existence of a through route whatever the form of the rates charged for the through service." *Thompson* v. *United States, supra*, 343 U.S. at 557.

The Commission recognized in *Through Routes And Through Rates*, 12 I.C.C. 163, 167-168, which is cited in *Denver & R. G. W. R. Co.* v. *Union P. R. Co.*, 351 U.S. 321, 327-328, that "it is settled that, whatever other facts or incidents of a shipment may serve to prove the existence of a through route, a through bill of lading is, as to the carriers recognizing it, conclusive evidence of the existence of such through route," and "through routes to certain points may be indicated by the presence of through routes to other points on

[9] A joint rate is a rate over two or more railroad lines published jointly by the railroads, with appropriate divisions of the joint rate being made by the participating carriers, whereas a combination rate is a rate published by a carrier for its portion of the rail shipment. *United States* v. *Great Northern R. Co.*, 343 U.S. 562, 566.

the same line, although the carrier may not have intended such result."

In the case at bar, joint rates apply over through routes on all general commodities for export or import between various points or areas served by the S.P. & S. System and the Milwaukee Road and its connections (I R 149; 300 I.C.C. at 501). To the extent that these joint rates are applicable, the routes are admittedly through routes (I R 89-90; 300 I.C.C. at 458).[10] We submit that the opening of the Spokane gateway to this extent for export and import shipments results in the opening of the gateway for other shipments. In addition, the Commission lists, in Appendix B to its report (I R 149-151; 300 I.C.C. at 501-502), other joint rates which have been established between the Milwaukee Road and the S.P. & S. System. For example, "there has been published or approved a full line of joint through rates on * * * [forest products] from all points on the S.P. & S. to all local points and some common points on the lines of the Milwaukee east of Spokane" (I R 90; 300 I.C.C. at 458, fn. 5). The foregoing circumstances, we submit, demonstrate that the Spokane gateway has been opened as a through route.

Other circumstances support this view. The interchange of cars between the Milwaukee Road and the S.P. & S. System is effected daily with expedition and a minimum of expense (III R 1179-1182). During the

[10] It is undisputed that the publication of joint rates, as a matter of law, "presupposes through routes." *Seatrain Lines, Inc.* v. *Akron, C. & Y. Ry. Co.*, 226 I.C.C. 7, 17.

representative year of 1952, relied upon by the Commission (I R 93; 300 I.C.C. at 460), 513 cars of freight *shipped on through bills of lading* were handled by the S.P. & S. System and the Milwaukee Road with the interchange made at Spokane (I R 93-95; 300 I.C.C. at 460-461). The 513 cars contained the following commodities: livestock, forest products, insecticides and fungicides, food products in cans and packages, candy, confectionery, laundry equipment, starch, chemicals, soap, cleansing and washing compounds, furniture, gasoline and other petroleum products, containers, motor vehicles, and miscellaneous commodities (I R 93; 300 I.C.C. at 460; Ex. 1, I R 386-387; VII R 3117-3144). The Commission states in its report that the 513 cars interchanged at Spokane moved only on joint rates which had been established between the S.P. & S. System and the Milwaukee Road (I R 93, 108-109; 300 I.C.C. at 460, 472),[11] but the uncontradicted evidence shows that only 387 of such cars moved on joint rates (I R 321-322), and, therefore, 126 cars moved via Spokane on the higher combination rates. Hence a substantial number of shipments were made at the combination rates.

The Commission's erroneous view that all of the 513 cars moved on joint rates is significant inasmuch as the 513 cars admittedly moved on "through bills of lading" (I R 93; 300 I.C.C. at 460), and as we have shown, *supra*, pp. 36-37, the Commission has held that "a through bill of lading is, as to the carriers recognizing

[11] The Commission recognized that through routes exist between the S.P. & S. System and the Milwaukee Road insofar as the joint rates are applicable (I R 89-90; 300 I.C.C. at 458).

it, conclusive evidence of the existence of such through route" (*Through Routes and Through Rates*, 12 I.C.C. 163, 167-168). If that prior holding by the Commission is applied to the facts in the case *sub judice*, the fact that 126 shipments were made on through bills of lading at the higher combination rates is "conclusive evidence" that through routes exist as to such shipments on the combination rates.[12] However, even if no cars moved on the combination rates, that circumstance would merely be further evidence that the Spokane gateway is "commercially closed" with respect to shipments made over the Milwaukee Road and the S.P. & S. System and, as we have shown, *supra*, pp. 29-32, the fact that the gateway is "commercially closed" does not negative the existence of through routes.

The uncontroverted facts with respect to the joint rates which have been established between the S.P. & S. System and the Milwaukee Road, together with the evidence that shipments have been made on through bills of lading under the combination rates, compel the conclusion that through routes exist between the Milwaukee Road and the S.P. & S. System as to all commodities irrespective of whether the shipments are under joint or combination rates. The Commission found, with respect to shipments made under the combination rates, that "[r]outes are available to and from points on the S.P. & S., via Spokane, in connection with the

[12] To be sure, the Commission held in *Beaman Elevator Co.* v. *Chicago & N.W. Ry. Co.*, 155 I.C.C. 313, 314-315, that a single shipment made on a through bill of lading which was issued by mistake does not establish the existence of a through route, but that case is not analogous to the case at bar. *Cf., Denver & R. G. W. R. Co.* v. *Union P. R. Co.*, 351 U.S. 321, 329.

complainant [Milwaukee Road] and its eastern connections" (I R 88; 300 I.C.C. at 457). Such a finding, in the circumstances of this case, compels the Commission to find that through routes are in existence irrespective of whether the routes are "commercially closed," *supra*, pp. 29-32.

II. Assuming, *Arguendo*, That The Commission Properly Determined That Through Routes Do Not Exist Between The S.P. & S. System And The Milwaukee Road, The Commission Erred In Determining That The Short-Hauling Limitation In § 15(4) Of The Act Is Relevant.

Assuming, *arguendo*, that the Commission properly determined that with limited exceptions through routes do not exist between the S.P. & S. System and the Milwaukee Road, the case should be remanded to the Commission because it failed to consider—aside from § 15(4) of the Act—whether through routes should be established under § 15(3) of the Act, which provides that:

> "The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by carriers subject to this chapter, * * * and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated" (49 U.S.C. § 15(3)).

The statutory authority of the Commission to establish through routes is subject to a limitation in § 15(4) of the Act which prevents a railroad from being "short-hauled." The exception to the Commission's authority is as follows:

> "In establishing any such through route the Commission shall not (except as provided in section 3 of this title [relating, *inter alia*, to undue preferences or prejudices], and except where one of the carriers is a water line) require *any carrier* by railroad, without its consent, *to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith*, which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic transportation [emphasis supplied] * * *" (49 U.S.C. § 15(4)).

The effect of this exception to the Commission's authority to establish through routes is that the Commission may not require a carrier to be "short-hauled," *i.e.*, to give up some of the traffic on its line or on an intermediate line under a common management or control with the railroad, unless, *inter alia*, an additional

through route is needed to provide adequate and more efficient or more economic transportation, or to remove undue preferences or prejudices.

No issue is presented, in this case, as to whether the S.P. & S. System is short-hauled inasmuch as Spokane is the eastern terminal of the S.P. & S. System. However, the Commission concluded that the S.P. & S. System is "operated in conjunction and under common management or control" with the Great Northern and the Northern Pacific, and that the Great Northern and the Northern Pacific, in conjunction with the S.P. & S. System, would be short-hauled if the proposed through routes and joint rates are established (I R 96-97, 101-107, 135; 300 I.C.C. at 463-471, 494-499). The Commission made no finding, free from the short-hauling limitations, as to whether the establishment of through routes under § 15(3) of the Act is necessary or desirable in the public interest (I R 107; 300 I.C.C. at 471). If the short-hauling limitations are irrelevant, the case would have to be remanded to the Commission for consideration of the issues apart from the short-hauling limitations.[13]

We shall show, *first*, that only a single railroad can operate or control another railroad within the meaning of the short-hauling limitation in § 15(4) of the Act,

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[13] The issue of discrimination against the Milwaukee Road, under § 3(4) of the Act (49 U.S.C. § 3(4)), would also have to be reconsidered by the Commission inasmuch as the Commission's decision under § 3(4) of the Act is based on its views with respect to the common management or control of the S.P. & S. System by the Great Northern and the Northern Pacific (I R 96-97, 101-107; 300 I.C.C. at 463-471).

and, *second*, that the Commission's decision, in this respect, is not supported by substantial evidence or adequate findings of fact.

A. *Only a Single Railroad Can Operate or Control Another Railroad Within the Meaning of the Short-Hauling Limitation in § 15(4) of the Act.*

The District Court sustained the decision of the Commission that the S.P. & S. System is operated under a common management or control with the Great Northern and the Northern Pacific (I R 161-170). The District Court recognized that "neither the Northern Pacific nor the Great Northern can individually control the S.P. & S." and that "there is no question but that the language of the statute [with respect to short-hauling] is framed in the singular, and, therefore, such a situation [*i.e.*, joint control by two railroads over a third railroad] does not fall within the precise wording of [§ 15(4) of] the Act" (I R 162). The issue, then, is whether the language of § 15(4) of the Act should, by judicial interpretation, be broadened so as to affirm the holding of the lower Court.

The Interstate Commerce Act as originally enacted (Act of February 4, 1887, 24 Stat. 379 *et seq.*) contained no provisions authorizing or directing the Commission to establish through routes or joint rates. Section 1 of the Act was amended in 1906 to require carriers to provide and furnish "transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto" (Act of June 29, 1906, 34 Stat. 584). Section 15 of the Act was

amended at the same time to authorize the Commission to establish through routes and joint rates, as follows:

> "The Commission may also, after hearing on a complaint, establish through routes and joint rates as the maximum to be charged and prescribe the division of such rates as hereinbefore provided, and the terms and conditions under which such through routes shall be operated, when that may be necessary to give effect to any provision of this Act, and the carriers complained of have refused or neglected to voluntarily establish such through routes and joint rates, provided no reasonable or satisfactory through route exists * * *" (34 Stat. 590).

Subsequently, the Act of June 18, 1910 (36 Stat. 539, 552), amended § 15 of the Act to authorize the Commission to establish through routes and joint rates on its own initiative. The Act of June 18, 1910, also repealed the proviso that through routes and joint rates could be established only if no reasonable or satisfactory through route existed (*ibid.*). The provisions as to short-hauling, at issue in this proceeding, were added at the same time, as follows (36 Stat. 552):

> "And in establishing such through route, the commission shall not require any company, without its consent, *to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith* which lies between the termini of such proposed through route, unless to do so would make such through route unreasonably long as compared with

another practicable through route which could otherwise be established [emphasis supplied]."[14]

Section 15 of the Act was amended by the Act of February 28, 1920 (41 Stat. 456, 485-486), to make mandatory the establishment of through routes and joint rates whenever deemed by the Commission to be "necessary or desirable in the public interest," and the Commission's authority to establish through routes and joint rates which would short-haul a carrier was enlarged to include (1) circumstances where one of the carriers is a water line and (2) circumstances involving §3 of the Act, *viz.*, relating, *inter alia*, to undue preferences or prejudices. The Commission was, additionally, authorized to establish emergency temporary through routes (41 Stat. 456, 486).

The Transportation Act of 1940 (Act of September 18, 1940, 54 Stat. 898, 911-912) further enlarged the Commission's power to establish through routes and joint rates which short-haul a carrier if the Commission "finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation * * *."

In short, the Commission's authority and mandate to establish through routes and joint rates has been expanded by Congress on several occasions since the limited authority, in this respect, was granted to the Commission in 1906. Congress has recognized the necessity of empowering the Commission with broad authority to require the establishment of through routes and joint rates.

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[14] The italicized language, which is at the center of the present litigation, has not been further amended. 49 U.S.C. § 15(4).

The limited restriction against short-hauling a carrier—added in 1910—is worded in the singular, and is expressly applicable only to a single railroad and to an intermediate railroad operated in conjunction and under a common management or control with the single railroad. It would seem that the appellees relate the short-hauling limitation to the managing or controlling power, and the appellees would make the limitation applicable to two or more railroads which jointly control another railroad. The short-hauling provisions, as enacted by Congress and as the appellees apparently would rephrase them, are as follows:

49 U.S.C. § 15(4)	Appellees' Version
"In establishing any such through route the Commission shall not * * * require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route * * *."	In establishing any such through route the Commission shall not * * * require any carrier *or carriers* by railroad, without consent, to embrace in such route substantially less than the entire length of its railroad, *or their railroads*, and of any other railroad operated in conjunction and under a common management or control therewith, *or under a joint management or control therewith*, which lies between the termini of such proposed through route.

There is "no better key" to a problem of statutory construction "than the law from which the challenged statute [or, as here, statutory provision] emerged." *United States* v. *Congress of Ind. Organizations*, 335 U.S. 106, 112-113. The mere reading, *in extenso*, of the relevant statutory sections manifests the Congressional purpose to differentiate carefully between the singular and plural, and that it is going very far indeed to argue a sameness of Congressional intention from these dissimilar statutory terms. The differences —as we shall show—cannot be disregarded, and the differences are plainly indicative of a difference of Congressional intent.

The short-hauling limitation, at issue in this case, was added by § 12 of the Act of June 18, 1910, and in that section the Congress used the phrase "carrier or carriers" seven times (36 Stat. 551-553). In the same section, the Congress referred twice to a connecting "line or lines" (36 Stat. 553). The use of the combined singular and plural phraseology in the same section of the Act in nine other respects emphasizes that the Congress intentionally used the singular in the short-hauling limitation. The combined use of the singular and plural, *i.e.*, "person or persons," "carrier or carriers," "order or orders," is also found throughout other sections of the Act of June 18, 1910, amending the Interstate Commerce Act (36 Stat. 539, 544-553). Hence there is no basis for reading into the short-hauling limitation both a singular and a plural meaning.

The collocation of terms in the Act of June 18, 1910, is significant of the legislative intent. When a provi-

sion is carefully included in some places in a statute and omitted at other places in the statute it should not be implied in the places at which it is omitted. *Lang* v. *Commissioner,* 289 U. S. 109, 112; *United States* v. *Atchison, T. & S. F. Ry. Co.,* 220 U. S. 37, 44; *Corn Products Refining Co.* v. *Benson,* 232 F. 2d 554, 562 (C. A. 2). Here, as in *Iselin* v. *United States,* 270 U. S. 245, 250-251, the "statute was evidently drawn with care" and to interpolate the language contended for by the appellees would not be a construction of the statute "but, in effect, an enlargement of it by the Court, so that what was omitted * * * may be included within its scope." It is not for the courts to beat down distinctions in a statute. *Bruner* v. *United States,* 343 U. S. 112, 116; *First National Bank* v. *Missouri,* 263 U. S. 640, 657; *Thornley* v. *United States,* 113 U. S. 310, 315; *Insurance Co.* v. *Ritchie,* 5 Wall. 541, 544-545; *Pennington* v. *Coxe,* 2 Cranch 33, 58-59. Where the terms in two statutory provisions are so unlike each other that the comparison exhibits only a contrast, instead of saying that these different provisions were designed to be similar "it would seem much more reasonable to say, that the one * * * [provision] exhibits a legislative mind materially variant in the particulars where the difference exists, from what is exhibited by the other." *Pennington* v. *Coxe,* 2 Cranch 33, 58-59. Similarly, in *United States* v. *Cooper Corp.,* 312 U. S. 600, 605, it was held that it is not the judicial function to "engraft on a statute additions which we think the legislature logically might or should have made." It is familiar doctrine that the judicial function is to "apply statutes on the basis of what Congress

has written, not what Congress might have written." *United States* v. *Great Northern R. Co.*, 343 U. S. 562, 575.

There are additional tokens of Congressional intention, tokens still within the statutory language and all pointing the same way. When the Congress intended to refer to joint ownership in the Act, it used appropriate language. For example, it is provided in § 5(2) of the Act that it shall be lawful, with the approval and authorization of the Commission, "for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise" (49 U.S.C. § 5(2)).[15] If the Congress had intended for joint ownership or joint control to be sufficient under § 15(4) of the Act, it would similarly have indicated its intention in that respect.

If the short-hauling exception to the Commission's authority to establish through routes applies in the case of joint control of one railroad by two other railroads, the question arises, on analysis, as to whether it would also apply to joint control by three railroads, or four, or five. The extent to which the Commission's authority, with respect to the establishment of through routes, is to be circumscribed depends on the legislative judgment as to the appropriate balancing of the various interests involved. The Congress has expressly drawn the line to protect against short-hauling the entire length of the line of a single railroad and

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[15] This language was included by the Act of June 16, 1933 (48 Stat. 211, 217), and the section containing this language was set forth in full, with some amendments, in the Transportation Act of 1940 (Act of September 18, 1940; 54 Stat. 898, 905).

of any intermediate railroad operated under a common management or control with the single railroad. There is no basis in the language of the Act for extending the short-hauling exception so that the exception applies, in addition, to a line and two intermediate lines which jointly control that line.

The legislative history of the 1910 amendments—which added the short-hauling exception at issue in this case—supports the view that the Congress intentionally used the singular terminology with respect to the short-hauling exception. The expansion in 1910 of the Commission's power with respect to the establishment of through routes irrespective of whether a reasonable through route existed was recommended by the Commission (45 Cong. Rec. 5019) and by the President in a message to Congress (45 Cong. Rec. 4845-4846). The expansion of the Commission's power in this respect was regarded as a significant part of the amendments to the Interstate Commerce Act enacted in 1910 and the additional power granted to the Commission with respect to through routes was recognized as a major improvement in the Act (45 Cong. Rec. 5851-5852; see, also, 45 Cong. Rec. 3372, 3466, 3475-3476, 4210, 4714, 4846, 4852, 4947, 5019, 5020, 5143, 5162, 5223, 6901, 7137, 7373, 7571, 8239; 45 Cong. Rec. Appendix p. 98). See, also, H. Rep. No. 923, 61st Cong., 2d Sess., pp. 4, 10-11.[16]

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[16] The Interstate Commerce Act was amended by the Act of June 18, 1910, to enlarge the power of the Commission to establish through routes irrespective of whether a satisfactory through route then existed, subject to the short-hauling exception at issue in this case (36 Stat. 539). The legislative history of the legislation is found in the reports and discussion on H.R. 17536, 61st Cong., 2d

It was recognized in 1910 that the Commission's authority as to through routes was being greatly enlarged subject only to limited exceptions. Senator Elkins who was in charge of the legislation in the Senate, explained that the bill gives the Commission "practically an unlimited" authority with respect to through routes (45 Cong. Rec. 3475). See, also, 45 Cong. Rec. 4617-4618. Specifically, Senator Elkins explained:

> "This is practically an unlimited authority, whether a reasonable through route and joint rate have been established by the voluntary act of the carriers or not, and the only limitation upon the power of the commission is, first, that such through

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Sess., which became the Act of June 18, 1910, and in the companion Senate bill, S. 6737, 61st Cong., 2d Sess. The House passed H.R. 17536, but the Senate struck all of the provisions after the enacting clause and substituted a bill of its own (45 Cong. Rec. 7374, 8470). The conferees struck all of the provisions after the enacting clause and substituted a new bill (*ibid.*). Both the Senate bill (S. 6737) and the House bill (H.R. 17536) contained the provision authorizing the commission to establish through routes irrespective of whether a satisfactory through route then existed (see Sen. Doc. No. 606, 61st Cong., 2d Sess., p. 27). The Senate bill contained, in addition, the exception, at issue in this case, with respect to not requiring "any company, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith" (*id.* at 27-28). The House bill (H.R. 17536) originally contained the same exception, but the exception was left out in the version of the bill sent to the floor by the House Committee, and the House bill was debated and passed by the House without the qualifying exception at issue in this case (see Sen. Doc. No. 606, 61st Cong., 2d Sess., p. 27; H. Rep. No. 923, 61st Cong., 2d Sess., pp. 85-86; 45 Cong. Rec. 4714, 5841). However, the conferees retained "the Senate provision in reference to the length of line of a railroad which must be included in a through route" (H. Conf. Rep. No. 1588, 61st Cong., 2d Sess., p. 23); and the final bill, as enacted, included the exception (36 Stat. 539).

route, classification, or rate shall not be used between suburban or interurban electric passenger railways not engaged in the general business of transporting freight, and therefore presumably without the proper equipment to handle freight traffic going to or from ordinary lines of steam railroad, and, secondly, without the consent of the carrier the commission is not authorized to establish such through routes that shall embrace substantially less than the entire length of such railroad, or any intermediate railroad operated in conjunction and under a common management or control thereof, which lies between the termini of such proposed through route, with the additional qualification to that limitation that if embracing substantially the length of the railroad it would render the route unreasonably long compared with another practicable through route, the commission is given authority, notwithstanding the limitation, to create such through route" (45 Cong. Rec. 3475).

In explaining the exception to the Commission's power at issue in this case, Senator Elkins also stated:

"The second exception to the grant of this power is one which has always been recognized in the transportation business of the country. The road that initiates the freight and starts it on its movement in interstate commerce should not be required, where it is a line not unreasonably long, to transfer its business *from its own road* to that of a competitor, especially when the commerce initiated by it can be as promptly and safely transported

from the point of shipment to the point of destination by its road as by the line of its competitor [emphasis supplied]" (45 Cong. Rec. 3475-3476).

The Congressional reports and debates do not support the view that the exception to the Commission's authority, in this respect, should be construed to include a railroad line partly or jointly owned by other railroad companies. Throughout the explanation of the bill in the Congressional reports and debates, the explanation of this exception to the Commission's authority as to through routes was stated in the singular, and there is no reference to joint ownership or partial ownership of another railroad line. For example, in the Conference report it is stated that the bill approved by the conferees "retains the Senate provision in reference to the length of the line *of a railroad* [emphasis supplied] which must be included in a through route" (H. Conf. Rep. No. 1588, 61st Cong., 2d Sess., p. 23). The Senate report states as follows:

"The action of the commission is further restricted by providing that in establishing such through route, no company shall be required, without its consent, to embrace therein substantially less than the entire length of its railroad and of any intermediate railroad operating in conjunction and under a common management or control therewith which lies between the termini of such proposed through route, unless to do so would make such through route unreasonably long as compared with another practical through route which could otherwise be established. It would seem to be unreason-

able to empower the commission to require a railroad company *having a line of its own* between two designated termini to allow a portion only of that line to be taken and linked up with other lines for the purpose of creating another through route in competition with it, thus depriving it of the natural advantage of possessing a direct line between the termini, unless such line should happen to be so much longer than the proposed new through route as to make the establishment of such new route not merely an added convenience, but a public necessity [emphasis supplied]" (Sen. Rep. No. 355, 61st Cong., 2d Sess., pp. 9-10).

In other explanations of the exception to the Commission's power as to through routes, the members of Congress referred only to a single railroad's line, *e.g.*, "its entire line" (45 Cong. Rec. 7571), "on that road" (45 Cong. Rec. 4714), "on any one road" (*ibid.*), "the entire line of the railway" (45 Cong. Rec. 3372), and "its entire length" (*ibid.*).

In brief, the legislative history of the 1910 amendatory legislation shows that the provision authorizing the Commission to establish through routes irrespective of whether a satisfactory through route existed was regarded as an important remedial provision significantly improving the Interstate Commerce Act, and only a limited exception was included with respect to short-hauling. This limited exception should not be enlarged beyond the express statutory provisions.

An exception, so carefully limited and circumscribed, is not to be enlarged by implication. The

burden rests on those persons—the appellees in this case—asserting or relying on an exception to demonstrate that they are within the strictly construed terms of the exception. *Piedmont & Northern Ry.* v. *Interstate Commerce Comm.*, 286 U.S. 299, 311-312; *McDonald* v. *United States*, 279 U.S. 12, 20-22; *United States* v. *Morrow*, 266 U.S. 531, 534-536; *Spokane & Inland R.R. Co.* v. *United States*, 241 U.S. 344, 350; *Schlemmer* v. *Buffalo, Rochester, etc. Ry.*, 205 U.S. 1, 10.

The legislative history with respect to amendments made to the Interstate Commerce Act by the Transportation Act of 1940 is also relevant. In the Transportation Act of 1940, a definition was added to the Interstate Commerce Act providing that for the purpose of certain sections of the Act—not including § 15(4) at issue in the case at bar—the term "control" shall be "construed to include actual as well as legal control, whether maintained or exercised through or by reason of the method of or circumstances surrounding organization or operation, through or by common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or through or by any other direct or indirect means; and to include the power to exercise control" (49 U.S.C. § 1(3)(b)). The "Conference Committee Report on the Transportation Act of 1940 * * * points out that this definition of 'control' was added in order to make applicable to specified sections of the Act * * * [not including § 15(4)] the benefit of the interpretation of this Court in *Rochester Telephone Co.* v. *United States*, 307 U.S. 125, 145-6, of the similar definition of 'control' in § 2 of

the Communications Act of 1934 * * *. In that case this Court had emphasized the breadth of the statutory language as embracing every type of control in fact." *United States* v. *Marshall Transport Co.*, 322 U.S. 31, 38.

In the *Rochester Telephone Company* case, *supra*, 307 U.S. at 144-146, the Court sustained a finding that the Rochester Telephone Company is "under the control" of the New York Telephone Company based primarily on the circumstances that the New York Company held one-third of the stock of the Rochester Company and was able to elect 5 of the 15 members of the Board of Directors and 2 of the 5 members of the Executive Committee of the Rochester Company. Based on the "actualities in such intercorporate relations" (307 U.S. at 146), the Court sustained the finding that the one-third ownership of the Rochester Company by the New York Company was sufficient to give the New York Company control of the Rochester Company. But in the case at bar, inasmuch as each of the Northern Lines has 50 percent of the ownership of the S. P. & S. System, neither railroad can control the S. P. & S. System even within the liberal definition of control reflected in the *Rochester Telephone Company* case.

The legislative history of the 1940 amendatory measure specifically shows that the new, liberalized definition of control was not made applicable to § 15(4) of the Act relating to the short-hauling provisions inasmuch as it was "thought undesirable to make any change in the interpretation of present law" in this respect. H. Rep. No. 2832, 76th Cong., 3rd Sess., p. 63; H. Rep. No. 2016, 76th Cong., 3rd Sess., p. 58. Hence the inter-

pretation of § 15(4) prior to the amendatory legislation in 1940 is significant.

The District Court recognized that prior to the amendatory legislation in 1940 the Commission had never held that joint ownership by two or more railroads is sufficient, under § 15(4) of the Act, to constitute "common management or control" (I R 162-170). Contrariwise, the Commission had held, prior to the amendatory legislation in 1940, that joint ownership was not sufficient to constitute common management or control within the meaning of § 15(4) of the Act. *Absorption of Switching Charges*, 157 I.C.C. 129, 132; *Manufacturers Ry. Co. v. Akron & W. Ry. Co.*, 172 I.C.C. 554, 560-564.[17] See, also: *Hughes Creek Coal Co. v. K. & M. Ry. Co.*, 29 I.C.C. 671, 672-681.

To be sure, the Commission held in some cases prior to the amendatory legislation in 1940 that in situations not involving § 15(4) of the Act a railroad jointly owned by two or more railroads may be considered as part of the system of the joint owners (I R 164-166), but there is no legislative history showing that the Congress intended that such decisions would also be applied under § 15(4) of the Act relating to short-hauling. Contrariwise, the legislative history of the short-hauling exception is in accord with our interpretation based on the

[17] These cases involve a terminal railroad which was jointly owned by 15 connecting railroads with a collective management and control by a majority of the 15 railroads. The Commission held that the terminal railroad and the companies which owned the terminal railroad were not operated in conjunction and under a common management or control within the meaning of § 15(4) of the Act. The same holding as to joint ownership and control by 15 railroads is equally applicable to joint ownership and control by two railroads.

literal language of the short-hauling exception, *supra*, pp. 43-50.

The cardinal rule is that a statute should be interpreted to achieve the legislative purpose (*United States* v. *American Trucking Ass'ns.*, 310 U. S. 534, 542-544), and "frequently the legislative history of a statute is the most fruitful source of instruction as to its proper interpretation" (*Flora* v. *United States*, 362 U. S. 145, 151). If one goes beyond the plain meaning that the Act spontaneously yields, the legislative history plainly shows that the limited exception as to short-hauling is not to be construed to include a railroad line partly or jointly owned by two or more railroad companies.

All statutory factors and the legislative history show that only a single railroad can operate or control another railroad within the meaning of the short-hauling exception in § 15(4) of the Act. The contrary holding of the Commission and the lower court is conflictive with the principle that a statute is not to be read "so as to put in what is not readily found there." *United States* v. *Hood*, 343 U. S. 148, 151. The courts, in the interpretation of an Act, are "neither to add nor to subtract, neither to delete nor to distort." *62 Cases of Jam* v. *United States*, 340 U. S. 593, 596.

B. *The Commission's Determination That the S.P. & S. System is Operated in Conjunction and Under a Common Management or Control With the Great Northern and Northern Pacific is Not Adequately Supported by the Record or Findings.*

The basic facts, as distinguished from the Commission's ultimate conclusions, with respect to the operation and management of the S.P. & S. System and the Northern Lines are not in dispute. The two railroads referred to as the Northern Lines, *viz.*, the Great Northern and the Northern Pacific, are competitive lines (I R 96-97; 300 I.C.C. at 462-463; IV R 1985). "Both the stock and the bonds of the S.P. & S. are owned in equal shares by the Great Northern and the Northern Pacific" (I R 97; 300 I.C.C. at 463). The S.P. & S. System depends equally on the Northern Lines for financial support and car supply (I R 98; 300 I.C.C. at 463-464). The president of the Great Northern and the president of the Northern Pacific alternate, year by year, as president and vice president of the S.P. & S. System (I R 99; 300 I.C.C. at 465). "Although in each year one northern-line president is the president of the S.P. & S. and the other is vice president, there is no difference in the authority exercised by each except in the title used in signing documents" (I R 100; 300 I.C.C. at 466). The S.P. & S. System has its own vice president in charge of its operating department (I R 99; 300 I.C.C. at 465).

The "freight traffic practices and policies of the S.P. & S. are directed and controlled jointly by the traffic departments of the northern lines, [but] the

local officials of the S.P. & S. are authorized to act within the framework of policies determined by the northern lines without specific approval from the traffic departments of the latter on each question which arises" (I R 100; 300 I.C.C. at 466). The S.P. & S. System is a member, with full voting powers, of the North Pacific Coast Freight Bureau, which is the tariff issuing agency of the northwestern railroads (I R 354-355), and it issues its own rate instructions to the Transcontinental Freight Bureau in matters involving it (IV R 1599-1600; VI R 2628). Generally, with respect to the S.P. & S. System's local territory, the S.P. & S. System is permitted, without specific approval in advance, to place rate and practice matters on the North Pacific Coast Freight Bureau docket to be handled in the regular course of business (I R 100; 300 I.C.C. at 466). All matters pertaining to transcontinental rates and practices are handled for the S.P. & S. System by the representatives of the Northern Lines (*ibid.*). With respect to rates on traffic other than transcontinental traffic and not applicable to the S.P. & S. System's local territory, the proposed rates of the S.P. & S. System must be submitted in advance to the Northern Lines, and if the Northern Lines are not in agreement, the S.P. & S. System "is permitted to exercise its best judgment" as to such rates. (*ibid.*).

All decisions by the Northern Lines relating to the S.P. & S. System are made jointly (IV R 1983-1987, 2023; V R 2040-2041). In case of disagreements between the Northern Lines, no action is taken by them (IV R 1983-1985; V R 2049, 2168-2169), and the S.P.

& S. System exercises its independent judgment in such matters (VI R 2511, 2631-2633). The S.P. & S. System has its own corporate organization (V R 2040); assumes all liability on its equipment trust obligations (V R 2076-2077); and does its own traffic solicitation in its local territory (VI R 2516).

In its relations with other carriers, the S.P. & S. System acts independently of the Northern Lines and is treated as an independent line (I R 354; V R 2171-2172, 2176-2177; VII R 2874-2877). On numerous occasions it has joined with the Great Northern and the Milwaukee Road in publishing rates competitive with those applicable via the S.P. & S. System and the Northern Pacific (VII R 2877). The S.P. & S. System negotiates divisions of rates with all lines, including the Northern Lines (VI R 2649). In short, the Northern Pacific and the Great Northern have separate, competitive managements (IV R 1985), and the S.P. & S. has a management separate from that of the Northern Lines (I R 99-100; 300 I.C.C. at 465-466; V R 2039-2041).

The evidence and the findings of the Commission show that to the extent that the Great Northern and the Northern Pacific can agree, they jointly control the traffic policy of the S.P. & S. System except in those areas in which the S.P. & S. System is permitted to exercise its independent judgment. Such findings and evidence are not sufficient to show that the S.P. & S. System is operated "in conjunction and under a common management or control" with either, or both, of the Northern Lines within the meaning of § 15(4) of the Act.

III. Assuming, *Arguendo*, That The Short-Hauling Provisions In § 15(4) Of The Act Are Relevant, The Commission's Conclusions As To Undue Preferences Or Prejudices And As To The Need For Additional Through Routes Are Not Supported By Adequate Findings Or Substantial Evidence.

Assuming, *arguendo*, that § 15(4) of the Act is relevant, the short-hauling limitation in § 15(4) is expressly inapplicable (i) in situations involving § 3 of the Act relating, *inter alia*, to undue preferences or prejudices (49 U.S.C. § 3(1)), or (ii) if the Commission finds that the proposed through route "is needed in order to provide adequate, and more efficient or more economic, transportation" (49 U.S.C. § 15(4)). If the S.P. & S. System or the Northern Lines are violating the provisions of § 3(1) of the Act relating to undue preferences or prejudices, there is no need to consider whether the proposed through routes are needed in order to provide "adequate, and more efficient or more economic, transportation." However, in the circumstances of this case, the same facts and findings are relevant with respect to both issues and, therefore, the issues are considered together in this brief. We submit that the Commission's conclusions (I R 141-142) as to undue preferences or prejudices and as to the need for additional through routes are not adequately supported by findings of fact or by substantial evidence on the record as a whole.

The Commission recognized that valuable transit privileges would be made available to shippers if the relief requested in this proceeding is granted. The Commission stated in its report that the "Milwaukee

offers a large number of transit privileges at points on its line," including "stops for partial loading or unloading, storage, grading, packing, sorting, consolidating, concentration, milling, fabrication, assembling, and distributing of many commodities, and in the case of livestock, grazing, feeding, and trying the market, among others" (I R 113; 300 I.C.C. at 476). The Commission recognized that such transit privileges, "considered valuable by certain shippers in marketing operations and permitting freer flow of traffic through the transit points, are available only when joint rates via the transit points are maintained" (*ibid.*).

Examples of transit privileges which would be made available to shippers under the relief requested in this case, and which "could be used advantageously by shippers" (I R 113; 300 I.C.C. at 476), are set forth by the Commission as follows:

> "In the case of shipments of sheep originating at Washtucna, Wash., or some other local point on the S.P. & S., stopping in transit for summer grazing in the areas along the lines of the Milwaukee in northern Idaho would be permitted under the transit arrangement. Later, the sheep could be marketed in the Midwest or East, and the through rate from point of origin would apply. Shipments of lumber originating at points on the S.P. & S. might be stopped at St. Maries, Idaho, a local point on the Milwaukee, 63 miles east of Spokane, for the completion of loading or for further finishing, and shipped to off-line markets at joint through rates. A feed-mill operator at Spokane,

with customers or branches on the S.P. & S., would be able to couple up credits representing movements of wheat or its products from Milwaukee points in Montana with soybean meal from Minnesota and corn from Iowa, for example, and secure protection of the balance of the through rates on the entire mixture, whereas under the present restricted application of rates such a shipper must forego the use of Milwaukee originated tonnage or be subjected to the local rate from Spokane to S.P. & S. destinations, which would result in transportation charges substantially higher than on grain originating at common and cross-country points on the northern lines in Montana. For example, the absence of the joint through rates sought prevents the use of the milling-in-transit privilege at Harlowton on wheat originating at Geraldine or numerous other Milwaukee stations in Montana when destined to Pasco and Goldendale, Wash., Astoria, Oreg., and numerous other local points on the S.P. & S.

* * * * *

"[I]t is sometimes necessary for shippers to change the destination point enroute. For instance, on a shipment initially consigned to Seattle, with stops at intermediate points on the Milwaukee, the competitive rate to that destination would be protected, but, should it become necessary also to stop at an S.P. & S. point, or to change the destination to an S.P. & S. point, the shipment would be subjected to a higher combination rate" (I R 113-115; 300 I.C.C. at 476-477).

The Commission stated that among the westbound transit privileges, at stations served by the Milwaukee, "which would be available if the Spokane gateway were open on an equality of rates in connection with the Milwaukee to S.P. & S. territory, is the privilege of stopping to complete loading of dairy products, and the transiting of canned goods," and "[s]imilar conditions obtain on eastbound shipments, such as lumber, fresh fruits and vegetables, and seeds" (I R 145; 300 I.C.C. at 477). The transit privileges, according to the Commission, "are especially valuable at small stations where full carloads cannot be handled economically" (*ibid.*). "As to lumber, while there are through rates on lumber and lumber products via Spokane to various local points on the Milwaukee, a shipper who diverts a shipment to an off-line destination beyond the local point must pay freight charges at the higher combination rates. This situation acts as a deterrent to the establishment of plants for the milling or manufacturing of lumber at points on the Milwaukee" (*ibid.*).

In addition to the general discussion by the Commission of the transit privileges which would be made available to shippers under our contentions, the Commission referred to specific exemplificative situations which, we submit, reveal the need for such transit privileges. For example, with respect to livestock, the following testimony is referred to:

> "A livestock producer, engaged principally in sheep raising at Washtucna, Wash., the site of his winter range, testified * * * to the effect that sheep must be shifted from winter range to sum-

mer range in early May; that he sometimes 'summer grazes' his sheep in the St. Maries' area which is local to the Milwaukee and at the completion of summer grazing, lambs are ready for market. His sheep are transported by the S.P. & S. to the summer range for grazing in transit, and in the autumn, when they are ready for market, they are shipped by rail to Chicago. There are no through rates from Washtucna to Chicago over the S.P. & S. and the Milwaukee, with grazing in transit, and the combination rates applicable thereon increase the freight charges by about $40 per car over the charges that would accrue at the joint through rates sought" (I R 133-134; 300 I.C.C. at 492).[18].

The Commission referred to the operations of a wholesale grain dealer at Seattle engaged in the business of buying corn from dealers in Minneapolis, Sioux City, Omaha, and country origins in the Midwest, for sale in the Pacific Northwest, as follows:

"Generally, when a car is shipped from the origin point the ultimate destination is not known. In such instances the cars are usually billed for diversion to either Spokane or Seattle with the delivering carrier specified. If a shipment cannot be diverted from Spokane, for example, at the balance of a joint through rate from origin to destina-

[18] The testimony on which we rely as to livestock is found in numerous places in the record, see, *e.g.*, I R 342-343, 351, 426-435; II R 495, 497-498; III R 1051-1055, 1068, 1076-1077, 1109-1136, 1153-1154, 1157.

tion, the buyer will either refuse the shipment or insist on a substantial discount. It is important to this company, therefore, to have widespread routes, Spokane and west, which will permit liberal use of transit privileges. The absence of joint through rates on westbound shipments of grain from Milwaukee origins to destinations on the S.P. & S. on traffic routed over the Milwaukee via Spokane tends to cause this company to limit the shipment of corn from Milwaukee origins to Spokane to that which may be disposed of at destinations on the Milwaukee, *and this situation results in frequent shortages for such destinations* [emphasis supplied]." (I R 128; 300 I.C.C. at 487-488).[19]

The Commission stated that there is evidence that the "marketing of western lumber and forest products requires flexible and liberal routing, together with liberal transit privileges" (I R 123-124; 300 I.C.C. at 484). "Economical transportation costs, resulting from competitive through rates, are necessary because the production of these products in the Pacific Northwest greatly exceeds local needs and the bulk of it is marketed principally in the Midwest and East in com-

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[19] The testimony on which we rely as to grain is found in numerous places in the record, see, *e.g.*, I R 347-348, 454-475; II R 616-624, 635-652, 684-689, 693-707, 876-886, 929-956; III R 1068, 1154-1155; IV R 1572-1576. Producers of grain who are adjacent to the Milwaukee Road, and who desire to ship to the west, can sell to mills on the lines of the S.P. & S. System, after the required inspection at Spokane, only at a penalty in freight charges, and the penalty affects their market prices (I R 127-129; 300 I.C.C. at 487-489; II R 636-637, 695-697; III R 1071).

petition with lumber produced in the South and elsewhere; the center of western lumber production is constantly shifting; the market is unpredictable with demand and prices fluctuating from day to day, thereby necessitating the diversion of cars from a weakening market to one of greater strength" (I R 124; 300 I.C.C. at 484). To meet the demands of the lumber industry, "there has developed the custom of loading and shipping so-called transit cars, which are billed to a convenient junction point in the Midwest or East" (I R 124; 300 I.C.C. at 485). However, as a result of the lack of joint through rates between the Milwaukee Road and the S.P. & S. System, "closed or pocket markets" exist along the line of the Milwaukee Road. The evidence, with respect to such "closed or pocket markets," was summarized by the Commission, as follows:

> "The transit method of merchandising necessitates flexible routing, and shippers are reluctant to ship a transit car over a route which does not have competitive through rates. * * * Presently, some wholesalers make no effort to sell lumber produced at mills on the S.P. & S. in Milwaukee territory because, if they ship via Spokane in connection with the Milwaukee, they cannot move the cars out of Milwaukee local-territory points without paying higher rates. Such points are called closed or pocket markets" (I R 124; 300 I.C.C. at 485).[20]

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[20] The testimony on which we rely as to lumber is found in numerous places in the record, see *e.g.*, I R 289-293, 334-335, 343-352, 357-381, 390, 426, 444-453, 485-492; II R 493-495, 503-548, 572-616,

Evidence showing a need for transit privileges with respect to the shipment of fresh fruits and vegetables was also referred to by the Commission (I R 129-130; 300 I.C.C. at 489).[21] The position of the Secretary of Agriculture of the United States was set forth by the Commission, as follows:

> "The Secretary of Agriculture takes the position that the exclusion of the Milwaukee from full participation in the traffic moving to and from the S. P. & S. territory makes impossible the desired flexible and expeditious distribution of agricultural commodities and farm supplies by producers and shippers. The evidence shows that large quantities of agricultural commodities are produced in and distributed from the Pacific Northwest; that Oregon and Washington are surplus-producing areas for many of such commodities; and that Spokane is an important gateway for their distribution" (I R 115; 300 I.C.C. at 478).

The Hearing Examiner concluded, based on all of the evidence in this case, that additional through routes and competitive joint rates between the S. P. & S. System and the Milwaukee Road are needed—with respect to various commodities, including forest products, livestock, and fresh fruits and vegetables—in order to provide adequate and more efficient or economic trans-

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641-652, 689-692, 708-738, 797-867, 913-929, 957-1003; III R 1007-1050, 1068, 1147-1153, 1155, 1239-1426, 1440, 1456-1475; IV R. 1523-1544, 1802-1803; VII R 2856-2861, 2872-2873.

[21] The testimony on which we rely as to fresh fruits and vegetables is found in several places in the record, see, *e.g.*, I R 350-351; II R 652-677; III R 1068.

portation and to eliminate unlawful discrimination and prejudice to shippers using the Milwaukee Road for the shipment of such commodities (I R 277-281).

The Commission's failure to establish the through routes and competitive joint rates sought in this proceeding with respect to agricultural commodities is contrary to the Commission's prior action in other similar circumstances. For example, in a similar proceeding with respect to the Ogden gateway, the Commission determined that additional through routes and joint rates as to agricultural commodities should be established (*Denver & R. G. W. R. Co.* v. *Union Pac. R. Co.*, 287 I.C.C. 611, 620-660), and the Commission's order was sustained on judicial review (*Denver & R. G. W. R. Co.* v. *Union P. R. Co.*, 351 U.S. 321, 330-335). This Court held, on judicial review of the Commission's order, that § 15(4) of the Act "empowers the Commission to consider the interests of shippers and the kind of services they get and need as well as the interests of carriers in determining whether additional routes should be established to provide 'adequate' and 'more economic' transportation service. We have held that in determining this question the Commission should look beyond the mere adequacy of the carrier's physical operations 'to the broader public interest which embraces service to shippers and the rates they pay'" (351 U. S. at 331-332).[22]

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[22] The Court held in *Pennsylvania R. Co.* v. *United States*, 323 U.S. 588, 592-593, that the criterion of "adequacy" of transportation, as used in § 15(4) of the Act, "would seem to apply only to the interest of the shipping public," whereas the expressions "efficient" and "economic" transportation "may well embrace both shippers' and carriers' interests" (*id.* at 593).

In the *Denver & R. G. W. R. Co.* case, *supra*, the "evidence showed and the Commission found that in marketing food and other perishable products it is a general practice among railroads to allow diversion of carloads in transit as markets are found and sales are made. The successful operation of this practice requires the existence of joint through rates to the final market, since diversion or reconsignment would often, as a practical matter, be unavailable to a shipper who is compelled to reconsign his goods at high combination rates," resulting in "closed or pocket markets" (351 U. S. at 333-334). The Court referred to the numerous services which are necesary in the agricultural marketing system, *e.g.*, grazing livestock in transit, partial unloading, and storing or processing in transit (351 U. S. at 332-335). The Court held that "[w]e see no reason why a shipper's privilege to have his goods reconsigned at joint rates should not be considered on the same basis as transit services in determining the adequacy and economy of existing transportation" (351 U. S. at 334). In view of the need for transit and reconsignment privileges in the shipment of agricultural products, the Court sustained the order of the Commission opening the Ogden gateway to such shipments over the Denver and Rio Grande Western Railroad Company (351 U. S. at 332-335).

The same circumstances which required the establishment of through routes with respect to shipments via the Ogden gateway over the Denver and Rio Grande Western Railroad Company require the establishment of through routes with respect to shipments via the Spokane gateway over the Milwaukee Road. The Com-

mission, in its report, does not adequately explain its failure to follow its prior decision with respect to the Ogden gateway. In the circumstances here, as in *Secretary of Agriculture* v. *United States*, 350 U. S. 162; and *Secretary of Agriculture* v. *United States*, 347 U. S. 645, the order of the Commission should be set aside and the proceeding should be remanded to the Commission. See, also, *supra*, p. 34, fn. 8. In addition, the Commission failed to make a fair assessment of the record, and substantial evidence, on the record as a whole, fails to support the administrative findings. The Commission's order should, therefore, be set aside. See, *e.g.*, *Universal Camera Corp.* v. *Labor Board*, 340 U. S. 474, 488.

Numerous shippers and consignees who are adjacent to the lines of the Milwaukee Road testified that because of the rate disparities they cannot compete effectively with shippers and consignees located on the Northern Lines (see, *e.g.*, I R 379-381, 454-457, 469-471; II R 620-621, 637, 931; IV R 1572). The Commission has the authority to prevent such undue preferences or prejudices in the circumstances of this case. "Localities require protection as much from combinations of connecting carriers as from single carriers whose 'rails' reach them. Clearly the power of Congress and of the Commission to prevent interstate carriers from practicing discrimination against a particular locality is not confined to those whose rails enter it." *St. Louis S. W. Ry. Co.* v. *United States*, 245 U. S. 136, 144. See, also, *New York* v. *United States*, 331 U. S. 284, 341-342; *Texas & P. R. Co.* v. *United States*, 289 U. S. 627, 648-649; *Virginian Ry.* v. *United States*, 272 U. S.

658, 664-665; *Chicago, I. & L. Ry.* v. *United States*, 270 U. S. 287, 292-293; *United States* v. *Illinois Cent. R. R.*, 263 U. S. 515, 520-521.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the District Court should be reversed, the Commission's order of May 10, 1957, should be set aside and enjoined, and the proceeding should be remanded to the Commission for further consideration of the issues in accordance with this Court's opinion. If, however, the issues are resolved in our favor without further consideration by the Commission, a remand to the Commission would, nonetheless, be necessary so that the Commission could enter an appropriate order prescribing competitive joint rates between the Milwaukee Road and the S.P. & S. System.

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APPENDIX

The following are the relevant provisions of the Interstate Commerce Act (24 Stat. 379, as amended, 49 U.S.C. § 1 *et seq.*):

§ 1(3). Definitions.

* * * * *

§ 1(3).(b). For the purposes of sections 5, 12 (1), 20, 304(a) (7), 310, 320, 904 (b), 910, and 913 of this title, where reference is made to control (in referring to a relationship between any person or persons and another person or persons), such reference shall be construed to include actual as well as legal control, whether maintained or exercised through or by reason of the method of or circumstances surrounding organization or operation, through or by common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or through or by any other direct or indirect means; and to include the power to exercise control.

* * * * *

§ 1(4). Duty to furnish transportation and establish through routes; division of joint rates.

It shall be the duty of every common carrier subject to this chapter to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this chapter to establish reasonable through routes with common carriers.

by water subject to chapter 12 of this title, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers.

* * * * *

§ 3(1). Undue preferences or prejudices prohibited.

It shall be unlawful for any common carrier subject to the provisions of this chapter to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

* * * * *

§ 3(4). Interchange of traffic.

All carriers subject to the provisions of this chapter shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term "connecting line" means the connecting line of any carrier subject to the provisions of this chapter or any common carrier by water subject to chapter 12 of this title.

* * * * *

§ 5(2)(a). Unifications, mergers, and acquisitions of control.

It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this paragraph—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire

control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

* * * * *

§ 6(1). Schedule of rates, fares, and charges; filing and posting.

Every common carrier subject to the provisions of this chapter shall file with the Commission created by this chapter and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print, and keep open to public inspection, as aforesaid, the separately established rates, fares, and charges applied to the through transportation. * * *

* * * * *

§ 15(1). Commission empowered to determine and prescribe rates, classifications, etc.

Whenever, after full hearing, upon a complaint made as provided in section 13 of this title, or after full hearing under an order for investigation

and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this chapter for the transportation of persons or property, as defined in section 1 of this title, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this chapter, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

* * * * *

§ 15(3). Establishment of through routes, joint classifications, joint rates, fares, etc.

The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by carriers subject to this chapter, or by carriers by railroad subject to this chapter and common carriers by water subject to chapter 12 of this title, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character. If any tariff or schedule canceling any through route or joint rate, fare, charge, or classification, without the consent of all carriers parties thereto or authorization by the Commission, is suspended by the Commission for investigation, the burden of proof shall be upon the carrier or carriers proposing such cancelation to show that it is consistent with the public interest, without regard to the provisions of paragraph (4) of this section.

§ 15(4). Through routes to embrace entire length of railroad; temporary through routes.

In establishing any such through route the Commission shall not (except as provided in section 3 of this title, and except where one of the carriers is a water line) require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation: *Provided, however,* That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b) of this paragraph, give reasonable preference to the carrier by railroad which originates the traffic. No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs. In time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission, it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleadings by the interested carrier or carriers, and with or without notice, hear-

ing, or the making or filing of a report, according as the Commission may determine) establish temporarily such through routes as in its opinion are necessary or desirable in the public interest.

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SUPREME COURT OF THE UNITED STATES

Nos. 306 AND 307.—OCTOBER TERM, 1960.

Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Appellant, 306 *v.* United States, et al. Ezra Taft Benson, Secretary of Agriculture of the United States, Appellant, 307 *v.* United States, et al.	On Appeals From the United States District Court for the Eastern District of Wisconsin.

[June 5, 1961.]

MR. JUSTICE CLARK delivered the opinion of the Court.

These are direct appeals from an order of a three-judge District Court dismissing appellants' complaint seeking to set aside an Interstate Commerce Commission decision which refused to prescribe through routes and joint rates for traffic moving between appellant railroad and the Spokane, Portland and Seattle Railway (the "S. P. & S.") system[1] via Spokane, Washington. The Commission found, contrary to appellants' contention, that, with limited exceptions, no through routes existed for the movement of freight by the S. P. & S. system and appellant railroad (the "Milwaukee") via Spokane. It also held that the short-haul protection provided in

[1] The S. P. & S. system is composed of the Spokane, Portland and Seattle Railway Co. and two wholly owned subsidiaries, the Oregon Trunk Railway and the Oregon Electric Railway Co.

§ 15 (4) of the Interstate Commerce Act [2] applied because the S. P. & S. was operated in conjunction with and under common management of its parents, the Great Northern Railway Co. and the Northern Pacific Railway Co. (the "Northern Lines"), each of which owned 50% of the S. P. & S. Finally, it entered a finding that the refusal of S. P. & S. system to grant the through routes [3] and joint rates [4] requested did not result in discrimination against the Milwaukee or in undue preference or prejudice between shippers and localities and further found that they were not "needed in order to provide adequate and more efficient or more economic transportation." 300 I. C. C. 453. The District Court held that the findings of the Commission were supported by substantial evidence and affirmed its ruling as to the application of § 15 (4). 182 F. Supp. 81. We noted probable jurisdiction. 364 U. S. 860. We affirm the judgment.

The factual situation is described in detail in the Commission's report and we will, therefore, set it out only briefly. It appears that the S. P. & S. was built by the Northern Lines for the purpose of relieving congestion,

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[2] 49 U. S. C. § 15 (4) provides in pertinent part:
"In establishing any such through route the Commission shall not . . . require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route . . . ."

[3] "A 'through route' is an arrangement, express or implied, between connecting railroads for the continuous carriage of goods from the originating point on the line of one carrier to destination on the line of another." *St. Louis Southwestern R. Co.* v. *United States*, 245 U. S. 136, 139, note 2 (1917).

[4] "[T]he essential feature of a joint rate is that connecting roads have agreed or mutually consented to carry traffic from points on one road to points on another road for an aggregate charge which is less than the sum of their local charges between the same points." *New York, N. H. & H. R. Co.* v. *Platt*, 7 I. C. C. 323, 333 (1897).

avoiding double mountain trackage, and obtaining low grade road facilities to the West Coast. Its lines—approximately 950 miles in length—run along the Snake and Columbia Rivers westward between Spokane, Washington, and the Pacific Coast via Portland, Oregon. The lines of its parents, the Northern Lines, operate between Minneapolis-St. Paul, Minnesota, and the head of the Great Lakes on the east and Portland, Oregon, and coastal points in Washington on the west. They serve the larger cities in northern Idaho, Montana, North and South Dakota and Minnesota. The Milwaukee operates some 10,600 miles of line from Chicago, Illinois, and Westport, Indiana, on the east and Longview, Washington, on the west. While it serves many of the same cities in Idaho, Montana, the Dakotas and Minnesota from which the Northern Lines receive traffic, appellant railroad serves no point in Oregon directly. If it could establish through routes and joint rates with the S. P. & S. system, the Milwaukee might secure, on interchange at Spokane, much of the traffic that originates or terminates on the S. P. & S. system. On the other hand, the Northern Lines seek to obtain as much of this haul as is possible and have published joint rates on all important commodities interchanged between the S. P. & S. system and the Northern Lines at Spokane. These rates are lower than the combination of the local rates of the S. P. & S. and the appellant railroad now applicable to traffic which could be interchanged at the same point, Spokane, between these carriers. It appears that the S. P. & S. system and the Northern Lines are not opposed to the publication of joint rates by the S. P. & S. system and the Milwaukee for traffic to or from points served only by the latter (local points) but refuse to establish through routes and joint rates via appellant's line to points which are also served by the Northern Lines.

We find, as did the District Court, that substantial evidence does support the factual findings of the Commission. We shall, therefore, forego a discussion of the appellants' contentions based on the findings. We are left with only the principal issue, namely, whether the protection of § 15 (4) of the Act extends to two railroads owning a third in the relationship existing here.

The Northern Lines compete with each other but own in equal shares all of the bonds and stock of the S. P. & S. Their presidents alternate yearly as president and vice president of, and personally pass upon the executive problems of, the S. P. & S. which, however, has an operating vice president of its own. As to equipment, the Northern Lines furnish a substantial amount of the car supply of the S. P. & S. system. The traffic policies of the latter are directed and controlled jointly by the traffic departments of the Northern Lines. Transcontinental traffic matters are handled by representatives of the Northern Lines, but local traffic problems—under the general policies aforementioned—are left to the S. P. & S. officials. In short, except when the Northern Lines disagree between themselves, they entirely control the operation of the S. P. & S.

Section 1 (4) of the Interstate Commerce Act requires railroads "to establish reasonable through routes" with each other. Where such routes are not established voluntarily, the Commission has the power, under § 15 (3) of the Act, to prescribe them "whenever deemed by it to be necessary or desirable in the public interest." This authority is restricted against short hauling, however, by § 15 (4) which provides that the Commission "shall not . . . require any carrier by railroad . . . to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini

of such proposed through route . . . ." Appellants contend that since the eastern terminus of the S. P. & S. is Spokane, the establishment of the through routes via that point would not short haul the S. P. & S. If, however, the S. P. & S. is under the "common management or control" of the Northern Lines and the short-haul protection of §15 (4) is available to them, the through routes sought would, if granted, result in the latter being short hauled in contravention of this section.

The findings of the Commission, approved by the District Court, indicate clearly that neither of the Northern Lines individually controls the S. P. & S. However, it is equally clear that jointly they do manage and control it as effectively as if it were part of their own lines. This is particularly true of its traffic policy, which is the heart of the problem here. However, appellants contend that, regardless of the factual circumstances, as a matter of law only a single railroad can operate or control another line within the meaning of the short-haul protection of § 15 (4).

The short-haul exception of § 15 (4) originated in the Mann-Elkins Act of 1910. 36 Stat. 539, 552. The crucial words "common management or control" were not defined and the subsequent legislative history of the provision is of little assistance to our inquiry. However, the overriding purpose of the Congress seems to have been the protection of the traffic of the controlling line. As Senator Elkins, a coauthor of the measure, stated to the Senate, the exception "is one which has always been recognized in the transportation business of the country. The road that initiates the freight and starts it on its movement in interstate commerce should not be required . . . to transfer its business from its own road to that of a competitor . . . when the commerce initiated by it can be as promptly and safely transported . . . by its road as by the line of its competitor." 45 Cong. Rec. 3475–3476.

The same reasoning would equally apply here. Moreover, the Senate Report on the provision emphasizes the same purpose.[5]

While the language of the section is framed in the singular, it appears to us that the reason for this exception is as valid and necessary in the case of two railroads owning a third as it is when only a single railroad and its subsidiary are involved. See *Louisville & N. R. Co.* v. *United States*, 242 U. S. 60 (1916), where this Court, in construing the discrimination provisions of the predecessor of § 3 (4) of the Act, stated, "[t]herefore, if either carrier owned and used this terminal alone it could not be found to discriminate against the Tennessee Central by merely refusing to switch for it . . . . We conceive that what is true of one owner would be equally true of two joint owners . . . ." At p. 73.

Appellants rely heavily on the fact that the Congress, in enacting the Transportation Act of 1940, broadened the definition of the term "control" in many of the sections of the Interstate Commerce Act[6] but did not do so in § 15 (4), thereby indicating an intention to restrict the scope of the exception. This definition, however, was enacted as the result of this Court's holding in *Rochester Telephone Co.* v. *United States*, 307 U. S. 125 (1939), which gave a broad construction to "control" as used in § 2 (b) of the Communications Act. 47 U. S. C. § 152 (b). It appears that the Congress decided to extend this broad definition to certain sections of the Interstate Commerce Act to insure Commission jurisdic-

[5] "It would seem to be unreasonable to empower the commission to require a railroad company having a line of its own between two designated termini to allow a portion only of that line to be taken and linked up with other lines for the purpose of creating another through route in competition with it, thus depriving it of the natural advantage of possessing a direct line between the termini . . . ." S. Rep. No. 355, 61st Cong., 2d Sess. 10.

[6] 49 U. S. C. § 1 (3) (b).

tion over persons in indirect control of carriers. See H. R. Rep. No. 2016, 76th Cong., 3d Sess. 58. If, however, that definition were applied to § 15 (4), the opposite result would obtain and the Commission's power would be restricted for the short-haul exception would then be afforded to carriers having only an indirect control of another line. For this reason, the Congress "thought [it] undesirable to make any change in the interpretation of present law, . . . notably . . . § 15 (4)." H. R. Rep. No. 2832, 76th Cong., 3d Sess. 63.

Apparently the phrase "operated in conjunction and under a common management or control" has received no prior judicial interpretation as we have been unable to find any cases in point and have been referred to none by counsel. However, the decisions of the Interstate Commerce Commission support the view that control of the traffic policy of an affiliate is sufficient to constitute "control" or "management" within the meaning of § 15 (4). The Commission's conception of these terms was first expressed in a rate case, *Blackshear Mfg. Co.* v. *Atlantic Coast Line R. Co.*, 87 I. C. C. 654 (1924), in which the Commission stated that "the term 'carriers under the same management and control' . . . refers to carriers generally controlled through ownership, lease, or otherwise *to the extent of controlling traffic policy*, even though separate corporate entity may be maintained." At p. 664. (Emphasis added.) In subsequent rate cases the Commission has continued to apply this criterion to determine whether or not lines are under the same "management" or "control." [1]

[1] *Rates on Chert, Clay, Sand, and Gravel*, 197 I. C. C. 215 (1933); *Humbard Construction Co.* v. *Southern R. Co.*, 161 I. C. C. 38 (1930); *Justice Co.* v. *Holton Interurban R. Co.*, 153 I. C. C. 673 (1929); *Raleigh Freight Traffic Bureau* v. *Atlantic Coast Line R. Co.*, 107 I. C. C. 156 (1926); *Livestock To, From, and Between Points in the Southeast*, 101 I. C. C. 105 (1925); *Livestock To, From, and Between Points in the Southeast*, 91 I. C. C. 292 (1924).

In another line of rate-making cases, the Commission has held that there can be joint management and control of a third railroad.[8] In rate cases, the Commission generally prescribes a higher scale of distance rates for traffic moving over a combination of independent lines than it does for goods carried over a single line or over a parent-subsidiary system. The distinction is made because the latter are expected to result in economies of operation which should be passed on to the public. *Livestock To, From, and Between Points in the Southeast*, 101 I. C. C. 105 (1925). For the same reason, short or "weak" lines are allowed arbitraries, *i. e.*, differentially higher rates in addition to rate scales prescribed for general application, whereas small railroads under the "management" or "control" of larger lines are not permitted the additional rates. *Rate Structure Investigation, Part 13, Salt*, 197 I. C. C. 115 (1933).

Unless the long haul of railroads, under joint management and control as interpreted by the rate-making cases, is protected by § 15 (4), the advantages which the Commission assumed existed, *i. e.*, economies of operation, will be taken from them. The very reasons for applying the higher distance rates and denying arbitraries would cease to exist. Such a result, flowing from the failure to construe § 15 (4) as including joint control, would be clearly

[8] This group of cases is bottomed on *Chicago, M. & St. P. R. Co.* v. *Minneapolis Civic & Commerce Assn.*, 247 U. S. 490 (1918), wherein this Court found that two competitive railroads owning a subsidiary coequally did, for rate purposes, each "directly control and operate" the subsidiary and that the latter must be treated as a part of each of the two owning carriers. See *Des Moines Union Ry. Switching*, 231 I. C. C. 631 (1939); *Blum Packing Co.* v. *Southern Pacific R. Co.*, 204 I. C. C. 93 (1934); *Russ Market Co.* v. *Northwestern Pacific R. Co.*, 171 I. C. C. 117 (1930); *Eriksen* v. *Ann Arbor R. Co.*, 102 I. C. C. 374 (1925); *Pacific Lumber Co.* v. *Northewestern Pacific R. Co.*, 51 I. C. C. 738 (1918).

inconsistent with Commission policy in the rate-making cases. Therefore, the Commission has relied upon the same criteria in § 15 (4) cases. In *Alabama, T. & N. R. Co.* v. *Southern R. Co.*, 148 I. C. C. 708 (1928), the Commission specifically referred to its definition in *Blackshear, supra*, and applied the limitation of § 15 (4) to the three roads there involved. See also *Georgia & F. R. Co.* v. *Atlantic Coast Line R. Co.*, 191 I. C. C. 489 (1933). In fact, in seven separate proceedings involving the S. P. & S.,[9] the Commission has noted that for rate-making purposes it must be considered as part of the Northern Lines. In one of these proceedings *West Coast Lumbermen's Assn.* v. *Chicago, M. & St. P. R. Co.*, 129 I. C. C. 363 (1927), joint through rates via Canada were sought to destinations served by the Milwaukee and the Northern Lines. It was urged that the joint rates, if they were prescribed, should be made over routes that would secure the long haul of these railroads. The Commission refused to establish the joint rates via the Canadian routes, holding *inter alia*, that the S. P. & S. "is considered for rate-making purposes a part of the Northern Pacific and Great Northern." At p. 364.

Likewise, the case of *Seaboard Air Line R. Co.* v. *Carolina & N. R. Co.*, 204 I. C. C. 416 (1934), applied the *Blackshear* definition to discrimination cases under

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[9] *Helix Milling Co.* v. *Great Northern R. Co.*, 287 I. C. C. 77 (1952); *Pillsbury-Astoria Flour Mills Co.* v. *Great Northern R. Co.*, 198 I. C. C. 642 (1934); *Seattle, P. & S. R. Co.*, 41 I. C. C. Valuation Reports 1 (1932); *West Coast Lumbermen's Assn.* v. *Chicago, M. & St. P. R. Co.*, 129 I. C. C. 363 (1927); *Inland Empire Shippers League* v. *Director General*, 59 I. C. C. 321 (1920); *Astoria* v. *Seattle, P. & S. R. Co.*, 38 I. C. C. 16 (1916); and the *Portland Chamber of Commerce* v. *Oregon Railroad & Navigation Co.*, 19 I. C. C. 265 (1910).

§ 3 (4) of the Act.[10] The Commission held that under § 3 (3), the predecessor of § 3 (4), there could be no discrimination where the roads involved were under a common management and control. The Commission found that the Carolina & Northwestern officials "determine the policy to be adopted with regard to traffic matters local to that carrier, but in matters of common interest between the Southern and the Carolina & Northwestern, the policy determined by the Southern prevails. It is apparent, therefore, that both carriers are operated under a common management and control." At p. 420. Although not a § 15 (4) case, it is significant, as pointed out by the District Court, because the Commission applied the *Blackshear* test and, upon finding the roads under common management and control, permitted them to retain the long haul as protected by § 15 (4). The inter-relationship between the two sections as applied by the Commission indicates the necessity for the use of the same criteria as to control in each.

We do not consider the cases,[11] relied upon by the appellants, to the contrary. Common management and control was not established. They were concerned with ownership, as distinguished from control, and even that by more than two railroads. There is nothing in these cases holding that such control cannot exist under the joint ownership and active management of two carriers. Nor do we feel that appellants' other Commission cases are apposite.

Summarizing, we find that the Commission has for many years followed the *Blackshear* criteria as to what

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[10] 49 U. S. C. § 3 (4) provides in part that carriers "shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper."

[11] *Manufacturers R. Co.* v. *Ahnapee & W. R. Co.*, 172 I. C. C. 554 (1931); *Absorption of Switching Charges*, 157 I. C. C. 129 (1929).

constitutes "common management" or "control." Likewise, it has since permitted such management and control to be jointly exercised by more than one railroad. We believe that the Congress took note of these cases in 1940 when it decided not "to make any change in the interpretation" of the limitation provision of § 15 (4) of the Act. The judgment is therefore

Affirmed.

MR. JUSTICE STEWART took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES

Nos. 306 AND 307.—OCTOBER TERM, 1960.

Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Appellant,
306 *v.*
United States, et al.

Ezra Taft Benson, Secretary of Agriculture of the United States, Appellant,
307 *v.*
United States, et al.

On Appeals From the United States District Court for the Eastern District of Wisconsin.

[June 5, 1961.]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK concurs, dissenting.

Four lines pass through the Spokane Gateway to the West Coast: The Milwaukee, the Northern Pacific, and the Great Northern that reach Puget Sound and the S. P. & S. that reaches Portland, Oregon. The "triangle" referred to by the Commission has its apex in Spokane and its two base points in Portland and Seattle-Tacoma. The S. P. & S. is owned 50% by the Great Northern and 50% by the Northern Pacific.

The Milwaukee is at present under a disadvantage in shipments via the Spokane gateway. The disadvantage is not in service or facilities for service, but in the rate structure. When the Milwaukee—a road that reaches to Chicago—wants to ship goods to Portland over the shortest route—the S. P. & S.—it must quote combination rates. When the Great Northern and the Northern Pacific make those shipments, they get a preferred joint rate on a through route via Spokane. The result is to

"close the Spokane gateway in a commercial sense" so far as the Milwaukee is concerned. 300 I. C. C. 453, 457. The advantage which the S. P. & S. affords the Great Northern and Northern Pacific was stated by the Commission in *Portland Chamber of Commerce* v. *Oregon R. Co. & N. Co.*, 19 I. C. C. 265, 283, "It is used by the Great Northern and Northern Pacific in the transportation of all business between coast and interior points which can be handled more cheaply over it than over the existing lines of the Great Northern or Northern Pacific." That is a monopolistic advantage; it is control over traffic which the two lines are not entitled to exploit to the exclusion of the Milwaukee.

"Through routes" are the rule, § 1 (4), and the maintenance of discriminatory "combination rates," the exception. Under the terms of § 15 (3), the Commission is to establish the former whenever "necessary or desirable in the public interest." Only in § 15 (4) do we have an exception to this policy. Since 1910, Congress has recognized a railroad's limited right not to be "short-hauled," that is, not to have to carry over its lines traffic originating on, or destined to, another line when the entire carriage could as well have taken place on its own line. Here, the Northern Lines claim that they together with the jointly owned S. P. & S. make up a single system which the Milwaukee wants to short-haul.

The question presented concerns the meaning of the words "common management or control" as they are used in § 15 (4) of the Act.

First. If the Great Northern and Northern Pacific are to be granted the special monopolistic protection now extended, § 15 (4) need be rewritten. It says that the Commission shall not "require any carrier . . . to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control

therewith." The section is framed in the singular. When the short-haul protection was first given, the amended § 15 referred to "carrier or carriers" seven times (36 Stat. 551–553) and "line or lines" twice (36 Stat. 553). So it seems apparent that when the plural was intended, the plural was used. Senator Elkins in explaining the provision spoke in the singular: "*The road* that initiates the freight and starts it on its movement in interstate commerce should not be required, where *it* is a line not unreasonably long, to transfer its business *from its own road* to that of a competitor, especially when the commerce initiated *by it* can be as promptly and safely transported from the point of shipment to the point of destination by *its road* as by the line of *its* competitor." 45 Cong. Rec. 3476. (Emphasis added.)

The Senate Report spoke of the short-haul protection as extending to a railroad "having a line of its own between two designated termini." S. Rep. No. 355, 61st Cong., 2d Sess., p. 10. While the Transportation Act of 1940 greatly expanded the meaning of "control," the new definition was not made applicable to § 15 (4) because it was thought "undesirable to make any change in the interpretation of present law" in that regard.[1] H. R. Rep. No. 2832, 76th Cong., 3d Sess., p. 63.

Second. Prior to the 1940 legislation the Commission had held that joint ownership by two or more railroads was not sufficient to create "common management or control" within the meaning of § 15 (4). *Absorption of Switching Charges*, 157 I. C. C. 129, 132; *Manufacturers R. Co.* v. *Ahnapee & W. R. Co.*, 172 I. C. C. 554, 564. Those two cases involved a terminal railroad jointly

[1] The Court admits that Congress refused to broaden the protection of § 15 (4) in 1940. Yet it seems to think this refusal of no relevance. If Congress has refused "short-haul" protection to indirectly controlled lines, is it to be lightly assumed that that protection extends to *both* owners who jointly control a third line?

owned by 15 connecting roads. On oral argument counsel for the Commission conceded that those decisions are out of line with the present one. If control by 15 roads is not "common" control within the meaning of § 15 (4) I fail to see how control by two railroads is.[2] The other cases relied upon by the Court did not involve § 15 (4).

Cases such as *Blackshear Mfg. Co.* v. *ACLRR Co.* 87 I. C. C. 654 are irrelevant. There the Commission was concerned with what rates to fix that were "single-line" and what rates that were "joint-line." It defined "single-line rates" as those applicable over "single lines of railway or over two or more lines under the same general management and control"; and it defined "joint-line rates" as those applicable "only when the lines embraced in the route are not under common ownership or control." *Id.*, 664. It defined the term "carriers under the same management and control" as carriers "generally controlled through ownership, lease, or otherwise to the extent of controlling traffic policy, even though separate corporate entity may be maintained." *Id.*, 664. "Common ownership and control" for rate-making purposes was an innovation of the Commission, not a statutory term. The same is true of the other line of rate-making cases to which the Court refers—the ones represented by *Chicago M. & St. P. R. Co.* v. *Minneapolis C. & C. Assn.*, 247 U. S.

[2] In *Helix Milling Co.* v. *Great Northern R. Co.*, 287 I. C. C. 77, shippers wanted through routes and joint rates on the Great Northern, the Northern Pacific, and the S. P. & S. *via* the Spokane gateway. The Great Northern objected on the basis of the short-haul protection afforded by § 15 (4) of the Act. The Commission recognized that the short-haul issue was involved and made the findings as to the need for through routes on the assumption that the through routes would short-haul the objecting road. But no analysis or discussion of the present problem was made. Cf. *West Coast Lumbermen's Assn.* v. *Chicago, M. & St. P. R. Co.*, 129 I. C. C. 363, 364. It should be noted that *Alabama, T. & N. R. Co.* v. *Southern R. Co.*, 148 I. C. C. 708, 711, cited by the Court, does not involve *joint* control under § 15 (4).

490. There two railroads owning a third which in turn owned terminal tracks made no charge for use of the terminal against traffic moving over its lines but did not charge for its use by a competitor. This line of cases—like those involving "single-line" rates are concerned with just rates and rates that are non-discriminatory. Economies of operation will not disappear merely because a carrier has competition. Of course, a monopoly position may make an affiliated short line more profitable, but I do not think that that is the sole reason for denying such short lines "arbitraries."

Section 15 (4) deals with the highly specialized problem of the short-haul. The "short-haul" protection needs to be narrowly construed, lest it too end up as a device to discriminate against competitors and foreclose them from a market. That is why, I think, it was closely confined by Congress and put in the singular not the plural and not extended to group activities of railroads such as are involved here and in the terminal cases.

I would reverse the judgment below and remand the case to the Commission for further proceedings.